bartender, supported by other witnesses, argued the intoxicated patron whom he furnished alcohol did not exhibit signs of intoxication. 639 N.E.2d at 362. However, an expert testified that any person with a BAC of .21% "would manifest physical signs of intoxication." Id. Therefore, the court held that a trier of fact could conclude the bartender had actual knowledge of the patron's intoxication due to the patron's condition after leaving. Id. at 362-63. In contrast, in Delta Tau Delta, the court held the defendant did not exhibit any signs of intoxication when the alcohol was furnished. 712 N.E.2d at 974. The defendant was more talkative than usual but did not exhibit signs of intoxication such as "rowdy[ness] or stumbling. . . ." Id. at 975.

In our case, the facts set forth in the Complaint show that Defendant had actual knowledge of Zachary's visible intoxication because Defendant provided unsupervised free rein to his liquor-stocked-bar despite not knowing Zachary. This unlimited and unimpeded access directly contributed to Zachary's intoxicated behavior, evidenced by his stumbling, rowdiness, and elevated BAC.

When Zachary arrived at Defendant's party, Defendant encouraged him to join the small group of friends at the bar area. For nearly an hour, the party-goers drank strong cocktails, made more palatable by the tonic, limes, sour mix, and Diet Coke purchased and provided by Defendant. Like the intoxicated friend in Ashlock, Zachary drank these flavorful yet strong alcoholic drinks in the presence of Defendant and other guests. Unlike the defendant in Meyer who only drank two cocktails during the entire evening, Zachary drank so much alcohol in Defendant's presence that he does not remember his first drink alone at the end of the football game's first quarter. Moreover, like the irresponsible defendant in Ashlock, Defendant was no "disinterested bystander. . . ." 475 N.E.2d at 1171. Instead, Defendant was the host of the party and encouraged Zachary to join the guests at the bar despite not knowing him. Defendant was

also aware that Zachary refreshed his drink before following Defendant to the theater room. At no point did Defendant limit or responsibly supervise Zachary's alcohol intake. Defendant granted Zachary, a stranger, unimpeded access to the bar which he was entrusted to safeguard.

Zachary also exhibited behavioral signs of intoxication after drinking the cocktails furnished by Defendant. Like the defendant in Ashlock, Zachary lost his balance and fell after tripping over another guest. Moreover, just as the defendant in Ashlock required assistance to stand, Zachary required the use of the wall to steady his balance. Zachary's drunken behavior continued. After leaving the room alone, Zachary rowdily shouted "Huzzah!" Unlike the defendant in Delta Tau Delta, Zachary's abnormal physical and verbal behavior *were* signs of rowdiness and stumbling, and therefore, visible intoxication. Furthermore, like the intoxicated patron in Morrill, Zachary's BAC registered double the legal definition of intoxication. This suggests that Zachary's clumsy and rowdy behavior was *even more* indicative of an intoxicated and helpless guest. Defendant may argue there is a temporal question as to when Zachary became visibly drunk, and his intoxication occurred *after* leaving the theater room. However, the Complaint clearly shows that Zachary cannot remember the contents of his first, and possibly only, drink alone because of his *existing* intoxication *before* he left Defendant's presence in the theater room. Compl. ¶ 10.

Tripping in a room, requiring the use of a wall for balance, shouting alone, disappearing for an hour to use the bathroom, and registering a BAC double the legal definition of intoxication may not be indicators of visible drunkenness when viewed *independently*. However, when viewed *collectively* and in the setting of a stranger's party with an unrestricted open bar filled with liquor, it is clear that the confluence of factors provided in the Complaint establish

Defendant had actual knowledge of Zachary's intoxication. Consequently, Defendant's Motion to Dismiss should be denied.

CONCLUSION

Zachary Lewin's Complaint has stated a plausible claim upon which relief can be granted. Defendant had actual knowledge that Zachary was intoxicated when Zachary drunkenly tripped and fell, rowdily shouted, had unimpeded and unsupervised access to Defendant's alcohol, and registered a .16% BAC. Therefore, Indiana's Dram Shop statute does not shield Defendant from liability. Consequently, this Court should not grant the Motion to Dismiss, thus allowing Zachary's case to proceed.

DATED: Feb 5, 2019

2056500
Attorney for the Plaintiff

CERTIFICATE OF SERVICE

I, Michael Crowley, attorney for the Plaintiff, certify that I have served upon the Defendant a complete and accurate copy of this Plaintiff's Memorandum Opposing the Defendant Devin Conroy's Motion to Dismiss, by placing a copy in the United States Mail, sufficient postage affixed and addressed as follows:

Leslie Knope
Knope & Haverford L.L.P.
800 Park Street, Suite 1200
Indianapolis, IN 46225

DATED: Feb 5, 2019

Michael Crowley
Attorney for the Plaintiff

## Applicant Details

| | |
|---|---|
| First Name | **Rachel** |
| Middle Initial | **A** |
| Last Name | **Danner** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **rad114@georgetown.edu** |
| Address | **Address**<br>Street<br>**620 4th St. NE**<br>City<br>**Washington**<br>State/Territory<br>**District of Columbia**<br>Zip<br>**20002**<br>Country<br>**United States** |
| Contact Phone Number | **(919) 259-2800** |
| Other Phone Number | **(919) 259-2800** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Brown University** |
| Date of BA/BS | **May 2020** |
| JD/LLB From | **Georgetown University Law Center**<br>**https://www.nalplawschools.org/employer_profile?FormID=961** |
| Date of JD/LLB | **May 20, 2024** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **Georgetown Journal on Poverty Law and Policy** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Mezey, Naomi
mezeyn@georgetown.edu
Wolfman, Brian
wolfmanb@georgetown.edu
Han, Eun Hee
eh79@georgetown.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Rachel Danner
620 4th St. NE Washington, D.C. 20002 • rad114@georgetown.edu • (919) 259-2800

June 12, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to apply for a clerkship with your chambers beginning in 2024. I am a rising third-year student at Georgetown University Law Center, an Executive Articles Editor on the Georgetown Journal for Poverty Law and Policy, and a summer associate in McDermott Will & Emery's D.C. office.

A clerkship with your chambers would align with my long-term goals of deepening my understanding of the judicial process and becoming an effective advocate for my future clients. This past semester, I participated in Georgetown's Appellate Courts Immersion Clinic, and was able to contribute to the briefing and arguing of pro bono public interest cases in federal courts of appeals. I will continue to be part of the clinic during my final year of law school as a research assistant to the clinic's director. The experience has trained me to analyze complex legal questions and communicate about them effectively and succinctly in writing. I hope to make use of these skills, and to continue developing them, via a clerkship.

Enclosed please find my resume, law school transcript, and writing sample. The writing sample is a memorandum I prepared for the Appellate Courts Immersion Clinic. Letters of recommendation from the following people are included with my application: Brian Wolfman – Professor from Practice and Director, Appellate Courts Immersion Clinic, (202) 661-6582; Naomi Mezey – Agnes Williams Sesquicentennial Professor of Law and Culture, (202) 662-9854; and Eun Hee Han – Associate Professor of Law, Legal Practice, eh79@georgetown.edu.

Please let me know if you need any additional information. Thank you for your consideration.

Respectfully,

Rachel Danner

**Rachel Danner**
620 4th St. NE Washington, D.C. 20002 • rad114@georgetown.edu • (919) 259-2800

## Education

**Georgetown University Law Center** Washington, D.C.
Juris Doctor candidate, May 2024
GPA: 3.94, Dean's List 2021-2022
Journal: Georgetown Journal on Poverty Law & Policy, *Executive Articles Editor*
Honors & Activities: Appellate Courts Immersion Clinic, Public Interest Law Fellow

**Brown University** Providence, R.I.
Bachelor of Arts, *magna cum laude* in Public Health, May 2020
Honors: Phi Beta Kappa
Senior Paper: The North Carolina Health Opportunities Pilot: An Innovative, Bipartisan Approach to Address the Social Determinants of Health in Medicaid Populations

## Experience

**McDermott Will & Emery**, *Summer Associate* Washington, D.C. | Summer 2023

**Georgetown Law Appellate Courts Immersion Clinic**, *Student Counsel* Washington, D.C. | Spring 2023
- Researched and drafted appellate briefs in pro-bono public interest cases related to civil rights and employment discrimination
- Assisted with oral argument preparation for cases in front of the 5th, 8th, and D.C. Circuits
- Collaborated with fellow students and staff attorneys on related projects in support of ongoing cases

**O'Neill Institute for National and Global Health Law**, *Research Assistant* Washington, D.C. | Fall 2022
- Contributed to COVID-19 Law Lab database of global pandemic response measures
- Assisted with health law scholarship articles in preparation for publication

**U.S. Department of Labor, EBSA**, *Legal Intern* Washington, D.C. | Summer 2022
- Interned with Office of Health Plan Standards and Compliance Assistance
- Assisted in drafting regulatory and sub-regulatory guidance implementing provisions of ERISA relating to group health plans, including the No Surprises Act and the Mental Health Parity and Addiction Equity Act
- Prepared public comment summary for comments submitted pursuant to No Surprises Act interim final rules
- Worked with Office of Outreach, Education and Assistance to respond to stakeholder questions
- Researched and prepared summary of state laws relating to network accuracy requirements

**CDC Foundation**, *COVID-19 Contact Tracer* Washington, D.C. | July 2020 – December 2022
- Communicated with contacts of diagnosed COVID-19 cases and provided quarantine and isolation instructions
- Referred contacts for testing and connected them to community social services

**Rhode Island Center for Justice**, *Policy Intern and Interpreter* Providence, R.I. | Fall 2018 – Spring 2020
- Conducted policy research and coordinated advocacy for vulnerable communities with a focus on education, housing, and utility justice
- Communicated with Spanish-speaking clients and coordinated services to address needs

## Interests

- Conversationally fluent in Spanish
- Crochet and jigsaw puzzles

**Record of:** Rachel Amelia Danner
**GUID:** 815916206

**Course Level:** Juris Doctor

**Entering Program:**
Georgetown University Law Center
Juris Doctor
Major: Law

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2021** | | | | | | | |
| LAWJ | 001 | 93 | Legal Process and Society<br>Naomi Mezey | 4.00 | A+ | 17.32 | |
| LAWJ | 002 | 93 | Bargain, Exchange, and Liability<br>David Super | 6.00 | A | 24.00 | |
| LAWJ | 005 | 32 | Legal Practice: Writing and Analysis<br>EunHee Han | 2.00 | IP | 0.00 | |
| LAWJ | 009 | 33 | Legal Justice Seminar<br>Philomila Tsoukala | 3.00 | B+ | 9.99 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 13.00 | 13.00 | 51.31 | 3.95 |
| Cumulative | 13.00 | 13.00 | 51.31 | 3.95 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Spring 2022** | | | | | | | |
| LAWJ | 003 | 93 | Democracy and Coercion<br>Louis Seidman | 5.00 | A- | 18.35 | |
| LAWJ | 005 | 32 | Legal Practice: Writing and Analysis<br>EunHee Han | 4.00 | A | 16.00 | |
| LAWJ | 007 | 93 | Property in Time<br>Daniel Ernst | 4.00 | A | 16.00 | |
| LAWJ | 008 | 31 | Government Processes<br>Howard Shelanski | 4.00 | A | 16.00 | |

Dean's List 2021-2022

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 17.00 | 17.00 | 66.35 | 3.90 |
| Annual | 30.00 | 30.00 | 117.66 | 3.92 |
| Cumulative | 30.00 | 30.00 | 117.66 | 3.92 |

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Fall 2022** | | | | | | | |
| LAWJ | 1493 | 05 | Prison Law and Policy<br>Shon Hopwood | 3.00 | A- | 11.01 | |
| LAWJ | 165 | 02 | Evidence<br>Michael Pardo | 4.00 | A | 16.00 | |
| LAWJ | 178 | 05 | Federal Courts and the Federal System<br>Carlos Vazquez | 4.00 | A | 16.00 | |
| LAWJ | 215 | 09 | Constitutional Law II: Individual Rights and Liberties<br>Randy Barnett | 4.00 | A+ | 17.32 | |

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 15.00 | 15.00 | 60.33 | 4.02 |
| Cumulative | 45.00 | 45.00 | 177.99 | 3.96 |

----------Continued on Next Column----------

| Subj | Crs | Sec | Title | Crd | Grd | Pts | R |
|---|---|---|---|---|---|---|---|
| **Spring 2023** | | | | | | | |
| LAWJ | 049 | 05 | Appellate Courts and Advocacy Workshop | 2.00 | A | 8.00 | |
| LAWJ | 504 | 05 | Appellate Courts Immersion Clinic | | NG | | |
| LAWJ | 504 | 30 | ~Writing | 4.00 | A- | 14.68 | |
| LAWJ | 504 | 80 | ~Research and Analysis | 4.00 | A | 16.00 | |
| LAWJ | 504 | 81 | ~Advocacy & Client Relations | 4.00 | A | 16.00 | |

**Transcript Totals**

| | EHrs | QHrs | QPts | GPA |
|---|---|---|---|---|
| Current | 14.00 | 14.00 | 54.68 | 3.91 |
| Annual | 29.00 | 29.00 | 115.01 | 3.97 |
| Cumulative | 59.00 | 59.00 | 232.67 | 3.94 |

**End of Juris Doctor Record**

**Georgetown Law**
600 New Jersey Avenue, NW
Washington, DC 20001

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is with enthusiasm and complete confidence that I recommend Rachel Danner for a clerkship in your chambers. Rachel is at the very top of her class; she has journal, clinic, and professional experience; and she has an impressive work ethic. In addition, Rachel is a fundamentally fair-minded and thoughtful person who can see multiple sides of divisive issues. She will make a superb law clerk and lawyer.

I know Rachel because she was my student during her first semester of law school. I taught her in a class called Legal Process, which is our alternative curriculum's course in civil procedure. Georgetown's well-regarded alternative curriculum is innovative, challenging, and provides students with all the basic doctrinal tools of the first year as well as a grounding in jurisprudence. Students in the alternative curriculum learn the history of American legal thinking, from natural law and formalism through legal realism, law and economics, and more modern jurisprudential trends. This provides students with another layer of critical skills that allows them to understand the law through the lens of both philosophy and politics. To complement the theory they learn, my Legal Process students also do a number of hands-on exercises and problem-based simulations that give them a better appreciation for how civil procedure works in practice.

Rachel did spectacularly well in Legal Process. She aced both quizzes and her exam tied for the best exam in a class of 115 very bright students. That semester there were two exams with the same score at the very top of the class and there was a meaningful gap between those two exams and the other exams that earned an A. Rachel was in that elite group of two and I had no hesitation awarding her a rare A+ for her performance. Her exam showed that she was able to see the big picture, to hit all the granular issues, and knew how to do careful and sophisticated legal analysis. Not only did she display a masterful command of procedural doctrine, but she was able to appreciate the questions that the doctrine hadn't yet answered as well as how legal questions vary with different facts. In short, Rachel is undaunted by the most complex procedural rules or the most convoluted judicial opinions and is exceptional at seeing the nuances in a case without losing sight of the core questions.

Although Rachel did not speak frequently in class, when she did participate, her comments and questions demonstrated that she thoughtful, curious, intellectually engaged with the material, well prepared, and able to contribute in a way that advanced and enriched the discussion for everyone. I recall that Rachel was especially engaged in our class discussions about procedural due process and asked probing questions about the *Lassiter* case. She told me later that she had been struck by the ways that threshold issues such as access to legal information and to lawyers could have dramatic individual consequences. She saw early on how procedural developments directly and indirectly affect substantive legal rights, as well as how the politics of procedure often garners little public attention.

It is also important to remember that her impressive performance in Legal Process was during a year of uncertainty and anxiety for all students. It was our first time back in the classroom, everyone was masked, and the impacts of the pandemic were evident in every aspect of academic life and in many students' personal lives as well. Given that context, it took an unusual amount of discipline and focus to do as well as Rachel did.

Rachel is someone with an abiding concern for health care and health access, and she has pursued that interest as a summer intern at the Department of Justice, working on health plan standards and compliance, and also as a research assistant for the O'Neil Institute for National and Global Health Law, working on data collection and scholarship about the pandemic response. I have a vivid memory of meeting Rachel just before 1L classes began when I held online group meetings for incoming students. I was especially struck by Rachel's answer when I asked the group what they had been doing prior to starting law school. Rachel had been working as a COVID contact tracer in her home state of North Carolina, a place she described as "beautiful and complicated, with lovely beaches and bitter politics." It wasn't just the job that caught my attention, but the way she spoke about the people she met and the intense and intimate conversations she had with individuals for whom staying home from work could threaten their precarious livelihoods. What was most evident was Rachel's empathy for the people she interacted with and her ability to acknowledge the human costs of a health care policy she was working to support. In this brief conversation she demonstrated her decency, maturity, and professionalism.

Despite her on-going interest in health care, Rachel has been open-minded and eager to learn new things and pursue unexpected interests. One such unexpected interest is procedure. Given her early instincts for procedural thinking, it is perhaps not surprising that Rachel became something of a procedure enthusiast. That enthusiasm for her process-focused classes influenced her decision to apply to the Appellate Courts Immersion Clinic, an experience she described to me as "transformative." Her experience working in the clinic motivated her to apply for a clerkship and to explore litigation as a career.

Naomi Mezey - mezeyn@georgetown.edu

As I have gotten to know Rachel, I have come to appreciate the person she is and the impressive skills she has acquired. In addition to being wildly successful by all the traditional law school standards, Rachel is a lovely and self-reflective person. She is also someone with the maturity to see both the importance of large-scale legal policies and the human variation in how those policies are applied in real life. She also has the decency to care about that difference and its effects.

Rachel is a star. She is so smart, hard-working, and talented that one hardly needs to look beyond the resume. What is less clear from an initial acquaintance is how thoughtful she is and how much maturity she possesses. It is a constellation of qualities that will make her a wonderful and utterly reliable clerk. I am confident that she would work incredibly hard for you and impress you with her analytical skill, keen intelligence, and discretion. I recommend Rachel to you with complete confidence and enthusiasm.

If I can be of further assistance, please do not hesitate to let me know. The easiest way to reach me is by email or by calling my cell phone: 202-802-1836.

Sincerely,

Naomi Mezey
Agnes Williams Sesquicentennial Professor of Law and Culture

GEORGETOWN LAW

**Brian Wolfman**
Associate Professor of Law
Director, Appellate Courts Immersion Clinic

June 8, 2023

Re: Clerkship recommendation for **Rachel Danner**

I'm writing to provide my enthusiastic recommendation for Rachel Danner to serve as your law clerk.

I got to know Rachel during spring semester 2023, when she was a student-lawyer in the Appellate Courts Immersion Clinic at Georgetown University Law Center. (I am the clinic's director.) The clinic handles complex appeals in the federal courts of appeals and in the Supreme Court. Students act as the principal lawyers researching and writing briefs under my supervision.

The clinic operates full-time. Students take no classes other than the clinic and a co-requisite seminar about the law of the appellate courts. (I comment on Rachel's seminar performance later in this letter.) I worked with Rachel every day for an entire semester and was able to observe her as a judge would observe a law clerk or as a senior lawyer might observe a close associate. This letter, therefore, is based not on one exam, a handful of comments in class, or even a few meetings, but on an intensive, day-to-day working relationship.

I'll start with my bottom-line recommendation: Rachel would be an excellent clerk. Rachel did fine work across the board. Her analytical skills are top notch. She combines thoughtfulness with practicality. Her writing is generally clear and persuasive, and it is always shorn of pretense and jargon. I'm confident she has the writing skills expected of judicial law clerks.

One more point before getting into the details of Rachel's clinic work: Rachel was a second-year student when she was in our clinic. The great majority of the clinic's students are 3Ls, who often are better prepared than 2Ls to work on complex appellate litigation. That Rachel excelled in our clinic alongside her 3L peers, should, in my judgment add value to this

600 New Jersey Avenue, NW Washington, DC 20001-2075
PHONE 202-661-6582 FAX 202-662-9634
wolfmanb@law.georgetown.edu

recommendation. Rachel is simply more mature and more sophisticated about the law than most of her classmates.

I'll turn now to Rachel's major clinic projects.

First, Rachel worked under my direct supervision on a reply brief to the D.C. Circuit in an appeal seeking to topple a decades-old circuit precedent holding that a particular statute of limitations is "jurisdictional" and thus cannot be equitably tolled. Working with two other students, Rachel explained why, under circuit procedures, the prior precedent could be overruled by a panel without input from the en banc court. In addition, Rachel was solely responsible for arguing why, if the statutory time limit was nonjurisdictional, our client was entitled to tolling based on extraordinary, pandemic-related circumstances. Rachel did a beautiful job with the project. She turned up new and useful authority, and her writing was clear and succinct.

Rachel's two other projects were also challenging. In one, Rachel was asked to draft a petition for rehearing en banc involving the intersection of the Sixth Amendment speedy-trial right and *Younger* abstention. We were starting largely from scratch because the clinic hadn't handled the case at the panel stage. The issues would have been difficult for most experienced lawyers, yet Rachel understood them quickly, and she, alongside two colleagues, produced an excellent petition on a short timeline. Next, Rachel worked on an opening brief concerning whether a state's system of prison good-time credits triggers Fourteenth Amendment procedural due-process protections. The case required an understanding of a complex statutory and regulatory scheme, and Rachel showed great aptitude for separating what mattered from what did not.

Rachel took on another task that deserves special mention. Early in the semester, at the same time she was beginning her first brief-writing project, we asked Rachel to help prepare one of our staff lawyers for oral argument in the Eighth Circuit—for an employment-discrimination appeal involving both a large record and an important legal issue. We don't often ask our students to juggle like this, but Rachel was up to the task. She quickly and accurately ran down new authority, condensed the record for use at argument, and mooted the oralist. Rachel did this while getting her other clinic work done well and on time.

* * *

As noted at the beginning of this letter, students in my clinic are enrolled in a separately assessed seminar—the Appellate Courts and Advocacy

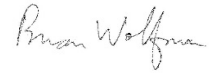
Workshop. The first two-thirds of the course is an intensive review of basic federal appellate law doctrine, including the various bases for appellate jurisdiction and the standards and scope of review. In this part of the course, students must master the difficult doctrinal material and apply it in a half dozen challenging writing assignments ranging from a motion to dismiss for lack of appellate jurisdiction to a statement of the case to a complex jurisdictional statement. We then take a short detour into Supreme Court jurisdiction and practice. Toward the end of the course, we cover a few advanced legal writing and appellate advocacy topics. Only capable students willing to work hard do well in this course. Given the course's subject matter and its blend of doctrine, writing, and practice, the course often appeals to students who desire clerkships. Rachel's work in this class was consistently strong. Again, her writing and analysis were excellent. Rachel received an "A" in a class populated by high-achieving students.

* * *

Rachel has more going for her than pure legal talent. She's a great colleague. She's fun to work with and has a quick wit. She's self-confident, but always ready to learn. She is honest and forthright. Importantly, she is not overly deferential. When she saw a problem that others did not, she brought it to the attention of colleagues, including older, more experienced mentors like myself, because she wanted to get things right and help our clients. For these reasons as well, Rachel would be an excellent addition to any judicial chambers.

I'll end where I began: I enthusiastically recommend Rachel Danner for a clerkship. If you would like to talk about Rachel, please contact me at 202-661-6582.

Sincerely,



Brian Wolfman

**Georgetown Law**
600 New Jersey Avenue, NW
Washington, DC 20001

June 09, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write this letter in support of Rachel Danner's application for a clerkship in your chambers. I have known Rachel since the fall of 2021, when she was enrolled in my full-year Legal Practice course, which covers legal research, writing, and analysis, at Georgetown University Law Center. Rachel is a wonderful student who demonstrated intellectual curiosity, excellent research and writing skills, and a true collegiality and caring for others. I know if given the opportunity, Rachel would make an excellent law clerk based on her strong legal writing abilities and desire to make a positive impact as a lawyer in practice.

As a first-year student in my Legal Practice course, Rachel stood out in her ability to consider all aspects of a legal issue in a careful, thoughtful, and insightful manner. She was always prepared for class sessions and quickly established herself as a considerate colleague in class discussions. Rachel's contributions to class discussions were always relevant and insightful, but what set her apart was that she would truly listen to others' contributions and respond to them or amplify them to take a discussion to the next level. Rachel's written work in my course also showed her ability to think through all aspects of a given problem, complete thorough research, and communicate in the effective and polished manner I would expect of a junior attorney in practice. In short, Rachel is more than ready to complete work in a professional setting.

Beyond her academic strengths, Rachel is a truly positive and considerate person who is wonderful to work with. She had a strong rapport with her colleagues in class, both offering her own contributions during group exercises and actively listening to and incorporating others' suggestions. In peer review assignments, particularly, Rachel was generous and courteous in her written feedback, which in its thoroughness showed a willingness to take the time to help her partner improve. Rachel also regularly sought to advance her writing skills in one-on-one meetings with me, and I never had to provide the same feedback twice.

Rachel is a gifted legal writer and a generous colleague, and I recommend her without reservation. If I can be of any other assistance, please feel free to contact me at eh79@georgetown.edu.

Sincerely,
Eun Hee Han
Associate Professor of Law, Legal Writing

Writing Sample

The attached writing sample is a memorandum I recently prepared as a research assistant for Georgetown's Appellate Courts Immersion Clinic. It analyzes the possible claims that an individual could include in a state habeas petition challenging his sentence and commitment in state prison. All identifiable citations (including statutory citations) have been modified to preserve the anonymity of the person and are thus no longer accurate. Names, dates, and other details have also been changed. The redactions have been approved by a supervising attorney. The sample has not otherwise been edited by anyone else.

Memorandum

## I. Question Presented

What are the possible arguments John Smith could present in a state habeas petition challenging his detention in Louisiana state prison?

## II. Background

John Smith is currently serving a sentence of 33 years to life in Louisiana state prison for a 2011 felony conviction for reckless driving. A first offense for reckless driving involving injury to another person generally carries a maximum term of one year in prison, plus fixed enhancements depending on the kinds of injuries sustained by others. *See* La. Stat. Ann. § 14:100. Mr. Smith, however, was sentenced under Louisiana's repeat-offender law, which imposes lengthy indeterminate sentences on defendants who have committed two or more prior serious or violent felonies. *See* La. Stat. Ann. § 15:529.1.

During the 13 years he has already served for this offense, Mr. Smith has sought relief through several channels, including direct appeal, administrative challenges within the Louisiana prison system, and federal and state habeas petitions. None of these efforts has so far been successful. Outlined below, after a discussion of Mr. Smith's circumstances, are various possible claims he could include in a new state habeas petition challenging the lawfulness of his sentence and commitment.

### A. Mr. Smith's Criminal History

#### 1. Past Criminal History

The felony reckless driving conviction was Mr. Smith's fourth qualifying offense for purposes of Louisiana's repeat-offender law. When defendants have two or more prior qualifying offenses, they can receive life sentences on top of any other sentence or enhancement

imposed. *See* La. Stat. Ann. § 15:529.1(4)(a). All his three prior qualifying offenses occurred on the same day in 1982, when he and his cousin, both 19 at the time, committed a series of unarmed convenience-store robberies.

Between 1982 and 2010, when the reckless driving incident occurred, Mr. Smith was convicted of a number of other felonies, misdemeanors, and parole violations, none of which constituted a qualifying offense. Five of these other violations resulted in time served in prison. This is noteworthy because in 2011, at the time Mr. Smith was sentenced, Article 120(b) of the Louisiana Code of Criminal Procedure allowed for a one-year sentence enhancement for each prior term served in prison. *See* La. Code Crim. Proc. Ann. art. 120(b). The relevant offenses included convictions in 1987, 1990, and 1992, and two convictions for simple possession of a controlled substance in 1998 and 2004. Since the passage of Proposition 50, simple possession is no longer a felony offense, which means that under current law Mr. Smith had not committed a felony offense in the 18 years leading up to the reckless driving incident.

**2. Instant Conviction**

In 2010 Mr. Smith was involved in a car accident. His cousin, the sole passenger in his vehicle, broke his femur in the crash. Three individuals in another vehicle were also injured. Mr. Smith was ultimately convicted of two violations of the Louisiana Criminal Code, for reckless driving and hit and run. *See* La. Stat. Ann. §§ 14:99; 14:100.

**3. Sentence Enhancements**

At sentencing Mr. Smith received a three-year enhancement for inflicting "great bodily injury" on his cousin. La. Stat. Ann. § 13022(a). He also received multiple enhancements for prior criminal activity. Because of his prior qualifying offenses, he received an enhancement of 25 years to life. Additionally, at the time Mr. Smith was sentenced there were two different

provisions of the Louisiana Code of Criminal Procedure that provided for other sentence enhancements for prior criminal activity. Article 100(a) mandated a five-year enhancement for any defendant with a prior serious felony. La. Code Crim. Proc. Ann. art. 100(a). Article 120(b) allowed for a one-year enhancement for any prior term served in prison. La. Code Crim. Proc. Ann. art. 120(b). Mr. Smith received both a five-year enhancement and five one-year enhancements. However, two procedural irregularities occurred in the application of these enhancements.

First, the five-year enhancement is listed on his Abstract of Judgement, the official record of his sentence, not as pursuant to 100(a) but rather 120(b). Second, the five one-year priors, correctly listed under 120(b), were imposed but "stayed" by the sentencing judge, meaning that they did not actually add additional years to his sentence. On direct appeal, the court found that there was no basis for imposing and staying the five one-year enhancements and ordered them stricken from his Abstract of Judgment. *People v. Smith*, No. E049586, 2011 WL 901027, at *4 (La. App. 2 Cir. 4/16/2011). Both irregularities are discussed below.

**B. Mr. Smith's Social and Psychological History**

[Redacted]

**C. Timeliness**

The timeliness of a new petition should not be an issue for two reasons. First, Mr. Smith can argue that his petition is not untimely because it is filed without substantial delay and with good cause. Timeliness of habeas petitions is measured "from the time the petitioner or his counsel knew, or reasonably should have known, the information offered in support of the claim and the legal basis for the claim." *In re Robbins*, 18 La. App. 4 Cir. 770, 780 (1998). Mr. Smith has been incarcerated since 2010 and was, until recently, unaware that he may be eligible for the

relief described below. *See In re Saunders*, 2 La. App. 3 Cir. 1033, 1040 (1970) (excusing a seven-year delay in filing a habeas petition because petitioner "was unaware of the applicable law").

Second, as a general matter, habeas petitions are not untimely if "the question is one of excessive punishment." *See In re Ward*, 64 La. App. 2 Cir. 672, 675 (1966). One of the primary claims Mr. Smith could bring in a new petition is that his sentence violates the cruel or unusual punishment clause of the Louisiana Constitution, which is a question of excessive punishment.

**III. Possible Claims**

**A. Mr. Smith's amended Abstract of Judgment reflects an illegal sentence under Louisiana Code of Criminal Procedure Article 120(b).**

Mr. Smith's amended Abstract of Judgment, issued to him in 2013 at the conclusion of his direct appeal, lists a five-year enhancement under Article 120(b). It is generally clear from other documents and his direct appeal opinion that this enhancement should have been listed under Article 100(a). *People v. Smith*, No. E049586, 2013 WL 901027, at *4 (La. App. 2 Cir. 4/16/2013). However, the Abstract of Judgment, which is the official record of his sentence, has never been corrected.

This enhancement, as listed on his official documents, is illegal in two respects. First, even at the time of Mr. Smith's sentencing, any given application of Article 120(b) was limited to one year per prior prison term. *See* La. Code Crim. Proc. Ann. art. 120(b). It has never been permissible to impose a five-year enhancement under 120(b), rather each one-year enhancement was imposed and listed separately. *Id.* Second, after the passage of Senate Bill 136, all enhancements imposed under Article 120(b) except those relating to sexually violent crimes are now illegal and the Louisiana Department of Public Safety and Corrections (DPS&C) is

affirmatively obligated to grant inmates with such enhancements full resentencing. La. Code Crim. Proc. Ann. art. 890.5. Mr. Smith has not received such a resentencing, even though his Abstract of Judgement lists an enhancement under Article 120(b).

It is possible that the court will view this discrepancy as a mere clerical error, which can be corrected without implicating any broader relief. *See People v. Mitchell*, 26 La. App. 2 Cir. 181, 185 (2001) ("Courts may correct clerical errors at any time" and may order "correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts."); *see also In re Compton*, No. B204169, 2008 WL 5393188, at *3 (La. App. 3 Cir. 12/28/2022) (granting a habeas petition in part to correct an Abstract of Judgment, but denying broader relief requested by the petition). Despite this, I recommend that this claim be included in a new petition because at a minimum it could lead to Mr. Smith having a corrected official record of his sentence. Further, DPS&C views discrepancies between an inmate's Abstract of Judgment and applicable sentencing law as grounds for referral for full resentencing. *See* 15 La. Admin. Code tit. 22, § X-201. A referral is merely a recommendation and does not create a legal obligation for an inmate to be resentenced, but the inclusion of the discrepancy in a habeas petition may bring the issue to their attention.

**B. Mr. Smith should have received a full resentencing in 2013 when the Article 120(b) enhancements were stricken from his sentence.**

The five one-year enhancements that could have been legally imposed in 2010 for each of Mr. Smith's five prior prison terms were imposed but stayed by the sentencing judge, and then stricken from his sentence on direct appeal. In *People v. James*, the court defined Louisiana's "full resentencing rule," which establishes that "when part of a sentence is stricken on review, on remand for resentencing a full resentencing as to all counts is appropriate." 5 La. App. 5 Cir. 857,

893 (2017). Mr. Smith did not receive a full resentencing when his stayed 120(b) enhancements were stricken. *See People v. Smith*, No. E049586, 2011 WL 901027, at *4 (La. App. 2 Cir. 4/16/2011). He was instead issued an amended Abstract of Judgement with the five one-year 120(b) enhancements removed, and the judgment was "[i]n all other respects" affirmed." *Id.* (As noted above, the 2013 amended Abstract of Judgment retains the illegal five-year enhancement listed under Article 120(b)).

Although *James* was decided after Mr. Smith's convictions became final, it relied on a long line of Louisiana authority predating his convictions that describe the rationale for the full resentencing rule. *See, e.g., People v. Navarro*, 40 La. App. 2 Cir. 668 (2007); *People v. Burbine*, 106 La. App. 1 Cir. 1250 (2003). A 1986 case explained that a rule requiring full resentencing "is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components." *People v. Hill*, 86 La. App. 4 Cir. 834, 836 (1986). Mr. Smith was therefore entitled to a full resentencing in 2013 when the Article 120(b) enhancements were stricken from his sentence. I recommend that this claim be included in the new petition.

**C. Mr. Smith's sentence violates the Equal Protection Clause because there is no rational basis for treating him differently than similarly situated defendants whose Article 120(b) enhancements were not stricken before the passage of Senate Bill 136.**

As discussed, Senate Bill 136 added Article 890.5 to the code of criminal procedure, rendering most Article 120(b) enhancements invalid, and requiring DPS&C to resentence all implicated inmates. Mr. Smith's five Article 120(b) enhancements were stricken from his Abstract of Judgment not because they could not have been imposed at the time of his sentencing, but because they were "erroneously stayed" by the trial court. *People v. Smith*, No.

E049586, 2011 WL 901027, at *4 (La. App. 2 Cir. 4/16/2011). Had the five one-year priors that were originally imposed remained a part of his sentence, he would now clearly be entitled to a full resentencing under Article 890.5. Mr. Smith could argue that because there is no rational basis for treating him differently from those similarly situated defendants who are now entitled to resentencing, his sentence violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

In *People v. Simpson*, the Court of Appeal found that Article 3051, a provision Code of Criminal Procedure governing youth offender parole, violated the Equal Protection Clause. La. App. 4 Cir. 273, 277 (2022). They held that there was no rational basis for differentiating between young adult offenders sentenced to life without parole for special-circumstances murder, and other young adult offenders sentenced to life with the possibility of parole for other serious or violent crimes, including premeditated murder. *Id.* at 284. It was unconstitutional for the latter group to be granted a youth offender parole hearing while the former was not. *Id.* Mr. Smith's position is in some sense even stronger than the defendant in *Simpson* because while that defendant had been convicted of a more serious crime than those found to be similarly situated to him, Mr. Smith is receiving differential treatment from defendants with identical or more serious criminal records whose Article 120(b) enhancements remain on their sentence.

There is a serious counterargument, however, that Mr. Smith is not similarly situated to those defendants eligible for resentencing, because the length of his sentence was not actually increased by the stricken enhancements, while theirs were. The court in *Simpson* analyzed the legislature's intent in enacting Article 3051 and found that the purpose of allowing young adult offenders an earlier parole determination should be applicable to both categories of defendants. *Id.* at 287. The legislative history of Article 890.5, however, demonstrates that it was intended to

"ensure equal justice and address systemic racial bias in sentencing." 2021 La. Legis. Serv. Ch. 728 (S.B. 483). Because the length of Mr. Smith's sentence was not ultimately impacted by the stricken enhancements, it is difficult to argue that he was denied equal justice with respect to the former version of 120(b). Because of this, and because of the novelty of this claim (it has not been litigated in any available decision), I do not recommend it be included in the new petition.

**D. New case law establishes that Mr. Smith's sentence of 33 years to life is impermissibly cruel or unusual under the Louisiana Constitution.**

In 2018 the Louisiana Supreme Court found that a 15-years-to-life sentence for a defendant convicted of attempted first-degree assault and attempted felony extortion imposed under the repeat offender law constituted cruel or unusual punishment under the Louisiana Constitution. *People v. Hilton*, 57 So.3d 1134, 1138 (La., 2020). A punishment is cruel or unusual when it "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." *Id.* at 1145. A finding of disproportionality depends on 1) the nature of the offense and/or the offender with particular regard to the degree of danger both present to society, 2) the difference between the challenged penalty and punishments for more serious offenses in Louisiana, and 3) the difference between the challenged penalty and punishments for the same offense in other states.

When considering the nature of Hilton's offenses and him as an offender, the court took into account that his first two qualifying offenses were committed on the same occasion when he was under 25 years of age, and that all his qualifying offenses were remote in time. *Id.* at 1141. Although he had been to prison since then, the court characterized his later criminal history as neither serious nor violent, including, among other offenses, a felony drug possession conviction that has since been reclassified as a misdemeanor. *Id.* at 1143, 1148. His crimes were related to

alcohol abuse, and the court noted that the law is evolving in in its treatment of people struggling with addiction. *Id.* at 1144, 1148. Finally, his age at sentencing, 42 years old, was "relevant to his background, character, and prospects," because given the proposed sentence of 15 years, he would not have been eligible for parole until he was approaching 60. *Id.* at 1144.

Mr. Smith is in many respects a similar offender to the defendant in *Hilton*. All of Mr. Smith's previous qualifying offenses were committed on the same day in 1982, 28 years before the car accident, and when he was only 19 years old. Mr. Smith's other criminal history similarly includes prison terms for less serious felonies, two of which have also been reclassified as misdemeanors. Multiple of his crimes, including the car accident, were related to the addiction with which he struggled all his life. And his current possibilities for parole are even more distant: sentenced at age 48 and currently 60 years old, if Mr. Smith were to serve his full 33-year minimum term he would not be eligible for parole until age 81. In addition, Mr. Smith suffered from severe childhood trauma, which is considered a mitigating factor for sentencing purposes under Louisiana law. *See* La. Stat. Ann. § 138.

There is also an important dissimilarity between *Hilton* and Mr. Smith's case, which is the impact of the most recent offense. The court in *Hilton* relied heavily on the fact that crimes for which he was sentenced did not result in physical harm to anyone. 57 So.3d 1134 at 1142. Four people were injured in the accident for which Mr. Smith is currently serving his sentence. However, the year after *Hilton* was decided, in *People v. Jordan*, a repeat-offender sentence for assault with a deadly weapon was also held to be cruel or unusual under the Louisiana Constitution, in part because a 35-year sentence for a 58-year-old defendant amounted to de facto life imprisonment. 55 So.3d 1007, 1031 (La., 2021). It is therefore likely that the result in *Hilton* was not dependent on the non-violent nature of the crime.

As to prongs two and three of the disproportionality inquiry, which compare the challenged sentence to more serious crimes within Louisiana and the same crime in other jurisdictions, the court noted that the sentence must be compared to other recidivist sentences. *Hilton*, 57 So.3d at 1149. It would therefore be inappropriate to compare Mr. Smith's 33 years, for example, to the sentence for a non-recidivist reckless driving causing injury in another state. However, the court noted that the repeat-offender sentencing regime has undergone and continues to undergo "significant change[s]," which in sum show that "legislators and courts are reconsidering the length of sentences in different contexts to decrease their severity." *Id.* at 1150-1151. Relying in part on these evolving standards, the court found that Hilton's sentence of 15 years to life violated the Louisiana Constitution because, "even as a recidivist, [it] exceeds the punishment in Louisiana for second degree murder, attempted premeditated murder, manslaughter, forcible rape, and child molestation." *Id.* at 1152. Mr. Smith's sentence, of which he has already served 13 years, far exceeds Hilton's.

Because new holdings on substantive constitutional law apply retroactively, *Hilton* applies retroactively to Mr. Smith's case. *See In re Kirchner*, 2 La. 3 Cir. 1040, 1048 (2017); *see also Montgomery v. Louisiana*, 577 U.S. 190, 212 (2016). And the evolving standards of decency analysis on which it relied should apply with even greater force to Mr. Smith given the changes that have occurred since *Hilton* was decided that further underscore the disproportionality of Mr. Smith's sentence. In 2021, Senate Bill 85 amended Section 127 of the Code of Criminal Procedure to instruct sentencing courts to dismiss enhancements resulting in sentences of more than 25 years, unless doing so "would threaten public safety." La. Stat. Ann. § 138(C)(2)-(3). Senate Bill 670 further restricted courts' discretion to impose the harshest possible penalties for all manner of crimes. La. Stat. Ann. §§ 1160; 1160.1. Other reforms have also occurred that

demonstrate the evolving standards that underly criminal sentencing in Louisiana. Because of the similarities between *Hilton* and Mr. Smith's case, and the reforms that have occurred since that decision, I recommend that this claim be included in the new petition.

**E. Mr. Smith received ineffective assistance of counsel at his sentencing hearing.**

Mr. Smith was entitled to effective representation at his sentencing hearing, including the presentation of readily available mitigating evidence. *People v. Grace*, 138 La. App. 4 Cir. 1207, 1212 (2006). It is possible, although difficult, to argue that he did not receive such effective representation. To demonstrate ineffective assistance of counsel under *Grace*, Mr. Smith would need to show that his counsel's performance both fell below an objective reasonable standard of care and prejudiced his case. *Id.* at 1212-1213. Mr. Smith's trial counsel on several occasions seems to have fallen below an objective reasonable standard of care. On at least three occasions she either failed to show up to court or arrived hours late, deficiencies for which she was assessed sanctions. However, she did prepare a *Pierce* motion which discussed some of the mitigating circumstances relevant to Mr. Smith, and to which she attached a 2007 psychological report that addressed his history of childhood trauma and mental health diagnoses. A *Pierce* motion is the mechanism through which defendants can argue that their prior qualifying offenses be disregarded for sentencing purposes. *See People v. Superior Ct. (Pierce)*, 12 La. 3 Cir. 497 (1995). Although Mr. Smith's counsel spoke only briefly about the motion at the sentencing hearing, the judge indicated that he had read and considered it before declining to disregard Mr. Smith's prior qualifying offenses.

It is therefore difficult to argue that Mr. Smith's counsel's failures prejudiced him in any significant way. Further, Mr. Smith has already brought a state habeas petition raising ineffective assistance of counsel. Although he focused on his counsel's infectiveness at trial rather than at

sentencing, the petition did raise her failure to show up on multiple instances, and the fact that she was sanctioned by the court. For these reasons, I do not recommend that an ineffective assistance claim be raised in a new petition.

## Applicant Details

| | |
|---|---|
| First Name | **Pablo** |
| Last Name | **Das** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **pabloaabirdas@gmail.com** |
| Address | **Address**<br>**Street**<br>**163 Attorney Street Apt 2D**<br>**City**<br>**New York City**<br>**State/Territory**<br>**New York**<br>**Zip**<br>**10002**<br>**Country**<br>**United States** |
| Contact Phone Number | **13017924158** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Boston University** |
| Date of BA/BS | **May 2016** |
| JD/LLB From | **University of Southern California Law School**<br>**http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90513&yr=2009** |
| Date of JD/LLB | **May 10, 2022** |
| Class Rank | **15%** |
| Law Review/ Journal | **Yes** |
| Journal(s) | **Southern California Law Review** |
| Moot Court Experience | **No** |

## Bar Admission

| | |
|---|---|
| Admission(s) | **New York** |

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Garry, Hannah
hgarry@law.usc.edu
213-740-9154

Brown, Rebecca
rbrown@law.usc.edu
213-740-1892

Wood, Abby
awood@law.usc.edu
(213) 740-8012

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

Pablo Aabir Das
163 Attorney Street, Apt. 2D
New York, NY 10002

April 2, 2023

Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I hope this letter finds you well. I am writing to apply for an August 2024 clerkship with your chambers.

I am currently a litigation associate at White & Case LLP in New York City. I graduated from the University of Southern California Gould School of Law in 2022 with a 3.80 GPA. While at USC, I served as an Executive Senior Editor on the Southern California Law Review and as an Advanced Student-Attorney in the International Human Rights Clinic.

I am confident that my extensive research and writing background will allow me to excel during my clerkship. In the past two years, I have published three academic papers, with a fourth piece forthcoming, on topics including voting rights, the shadow docket, and international human rights. During law school, I externed with the S.E.C. and the U.S. Attorney's office, where I wrote memos on a range of substantive and procedural legal issues. More recently, at White & Case, I have been a part of two trial teams within my first six months at the firm.

In my application package, I have included my resume, transcript, and writing sample. I have also arranged for you to receive letters of recommendation from professors Rebecca Brown, Abby Wood, and Hannah Garry. I would be honored to have the opportunity to clerk with you, and I thank you in advance for your consideration.

If you would like to discuss my application, please feel free to reach me at pabloaabirdas@gmail.com or 301-792-4158.

Respectfully,

Pablo Aabir Das

# PABLO AABIR DAS

pabloaabirdas@gmail.com | +1-301-792-4158 | New York, NY

## EDUCATION

**University of Southern California, Gould School of Law**, Los Angeles, CA **Juris Doctor, May 2022**
GPA: 3.80, *honors*, merit scholarship
Activities: Executive Senior Editor, Southern California Law Review; Advanced Student-Attorney, International Human Rights Clinic
Publications: (i) "Deep in the Shadows?: Analyzing the Shadow Docket" (Pablo Das & Lee Epstein, forthcoming *Virginia Law Rev.*); (ii) "Morocco v. Radi" (Hannah Garry, et al., July 2022, *Clooney Found.*); (iii) "The Emergency Docket" (Lee Epstein & Pablo Das, June 2022, report for the *N.Y. Times*); (iv)"Voting and Campaign Finance: Inconsistencies in Law and Policy" (Pablo Das, Dec. 2021, *S. Cal. Law Rev.*)

**Boston University, Pardee School of Global Studies,** Boston, MA **Bachelor of Arts, May 2016**
Major: International Relations Honors Program, *magna cum laude*
Awards: Senior Honors Thesis Award; Departmental Honors; University Research Award; White House Champion of Change

## RELEVANT EXPERIENCE

**White & Case, LLP,** New York, NY
*Summer Associate; Litigation Law Clerk* *May 2021 — August 2021; September 2022 — Present*
- Prepared legal memos on issues such as choice-of-law, tax law, bankruptcy law, securities law, civil rights law, and others.
- Assisted in witness preparation and trial preparation for a successful FINRA matter and for an international sports dispute.
- Started and currently lead a pro bono initiative representing formerly incarcerated individuals seeking the restoration of voting rights.

**U.S. Attorney's Office, Central District of California,** Los Angeles, CA
*Legal Extern, Criminal & National Security Division* *September 2021 — November 2021*
- Prepared legal memos on topics including public corruption, environmental crime, corporate fraud, and cybersecurity crime.
- Conducted research to assist the Public Corruption team in its investigation and prosecution of L.A. County public officials.
- Drafted successful Motion in Limine on evidentiary issues relating to hearsay exceptions for a cryptocurrency trial.

**U.S. Securities & Exchange Commission,** New York, NY
*1L Law Student Honors Program, Enforcement Division* *May 2020 — August 2020*
- Conducted legal research for enforcement matters including pyramid schemes, insider trading, and pump and dump schemes.
- Drafted a legal action memo on a transnational cryptocurrency fraud case for NY Enforcement staff.

**Reggora,** Boston, MA
*Head of Growth & Strategy; Strategy Advisor* *May 2018 — May 2020*
- Joined as a founding member of the fintech's executive team, and oversaw growth to 150 staff and >$50 million in fundraising.
- Managed the sales, finance, operations, and marketing teams to expand product to over 45 states and exceed $10 million in revenue.
- Served as a Strategy Advisor to the CEO from June 2020 – June 2022 consulting on regulatory reforms and fundraising initiatives.

**Observer Research Foundation,** New Delhi, India
*Visiting Research Associate, Global Governance Department* *September 2017 — May 2018*
- Published articles and reports on South Asian geopolitics with a focus on security, trade, diplomacy, and economic connectivity.

## ADDITIONAL INFORMATION

**Languages:** English (native); Hindi (advanced); Spanish (basic).
**Internship & Volunteer:** U.N. Human Rights Council (Geneva); DNC Voter Protection Initiative (Washington, D.C.); RFK Human Rights Center (Washington, D.C.); National Campaign on Dalit Human Rights (New Delhi); X-Cel Volunteer Teaching (Boston, MA).
**Interests:** Houseplants; biodynamic wines; chess; tennis; English Premier League; the Fermi Paradox.

# UNIVERSITY OF SOUTHERN CALIFORNIA
## OFFICIAL ACADEMIC TRANSCRIPT

**OFFICE OF THE REGISTRAR**
LOS ANGELES, CA 90089-0912
(213) 740-7445



| STUDENT NAME | STUDENT NUMBER | DATE | PAGE |
|---|---|---|---|
| Das, Aabir, S. | 4717-1998-01 | 08-22-2022 | 1 of 3 |



ISSUE TO:

CONTROL #: 000002342881

**RAISED SEAL NOT REQUIRED**

This transcript is not valid without the university seal and the signature of the Registrar. A raised seal is not required.

Frank Chang
Registrar

---------- Current Program of Study ----------

---------- USC Degrees Awarded ----------

05/13/2022 Juris Doctor — Law

---------- USC Cumulative Totals ----------

Law — Units Attempted: 92.0 Earned: 92.0 Available: 92.0 GPA Units: 53.0 Grade Points: 201.80 GPA: 3.80

Fall Semester 2019 (08-26-2019 to 12-18-2019)

| | | | |
|---|---|---|---|
| LAW-515 | 3.4 | 3.0 | Legal Research, Writing, and Advocacy I |
| LAW-509 | 3.2 | 4.0 | Torts I |
| LAW-503 | 3.8 | 4.0 | Contracts |
| LAW-502 | 3.4 | 4.0 | Procedure I |

| Term Units Attempted | Term Units Earned | Term GPA Units | Term Grade Points | Term GPA |
|---|---|---|---|---|
| 15.0 | 15.0 | 15.0 | 51.80 | 3.45 |

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| STUDENT NAME | STUDENT NUMBER | DATE | PAGE |
|---|---|---|---|
| Das, Aabir, S. | 4717-1998-01 | 08-22-2022 | 2 of 3 |

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**Spring Semester 2020 (01-13-2020 to 05-15-2020)**

**Grades of Credit/No Credit were required in Spring 2020 in response to COVID-19 global pandemic.**

| | | | |
|---|---|---|---|
| LAW-531 | CR | 3.0 | Ethical Issues for Public Interest, Government and Criminal Lawyers |
| LAW-516 | CR | 2.0 | Legal Research, Writing, and Advocacy II |
| LAW-508 | CR | 3.0 | Constitutional Law: Structure |
| LAW-507 | CR | 4.0 | Property |
| LAW-504 | CR | 3.0 | Criminal Law |

| Term Units Attempted | Term Units Earned | Term GPA Units | Term Grade Points | Term GPA |
|---|---|---|---|---|
| 15.0 | 15.0 | 0 | 0 | 0.00 |

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**Fall Semester 2020 (08-17-2020 to 12-16-2020)**

| | | | |
|---|---|---|---|
| LAW-622 | 4.1 | 2.0 | Money in Politics |
| LAW-621 | 4.1 | 3.0 | Gender Discrimination |
| LAW-603 | 3.6 | 4.0 | Business Organizations |
| LAW-767A | CR | 1.0 | Law Review Staff |
| LAW-849 | CR | 5.0 | International Human Rights Clinic I |

| Term Units Attempted | Term Units Earned | Term GPA Units | Term Grade Points | Term GPA |
|---|---|---|---|---|
| 15.0 | 15.0 | 9.0 | 34.90 | 3.87 |

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**Spring Semester 2021 (01-11-2021 to 05-14-2021)**

| | | | |
|---|---|---|---|
| LAW-890 | CR | 3.0 | Directed Research |
| LAW-865 | 3.8 | 3.0 | Legislative Policy Practicum |
| LAW-608 | 3.7 | 4.0 | Evidence |
| LAW-768 | CR | 1.0 | Law Review Writing |
| LAW-767B | CR | 1.0 | Law Review Staff |
| LAW-850 | 3.9 | 5.0 | International Human Rights Clinic II |

| Term Units Attempted | Term Units Earned | Term GPA Units | Term Grade Points | Term GPA |
|---|---|---|---|---|
| 17.0 | 17.0 | 12.0 | 45.70 | 3.80 |

# UNIVERSITY OF SOUTHERN CALIFORNIA
## OFFICIAL ACADEMIC TRANSCRIPT

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| STUDENT NAME | STUDENT NUMBER | DATE | PAGE |
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| Das, Aabir, S. | 4717-1998-01 | 08-22-2022 | 3 of 3 |

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**Fall Semester 2021 (08-23-2021 to 12-15-2021)**

| | | | |
|---|---|---|---|
| LAW-781 | CR | 4.0 | Externship I |
| LAW-769A | CR | 3.0 | Law Review Editing |
| LAW-532 | 4.1 | 3.0 | Constitutional Law: Rights |
| LAW-893 | 4.1 | 5.0 | Advanced Clinical Training |

| Term Units Attempted | Term Units Earned | Term GPA Units | Term Grade Points | Term GPA |
|---|---|---|---|---|
| 15.0 | 15.0 | 8.0 | 32.80 | 4.10 |

**Spring Semester 2022 (01-10-2022 to 05-13-2022)**

| | | | |
|---|---|---|---|
| LAW-893 | 4.2 | 3.0 | Advanced Clinical Training |
| LAW-867 | 4.1 | 3.0 | Corporate Fraud |
| LAW-769B | CR | 3.0 | Law Review Editing |
| LAW-683 | 3.9 | 3.0 | Fact Investigation and Discovery |
| LAW-602 | CR | 3.0 | Criminal Procedure |

| Term Units Attempted | Term Units Earned | Term GPA Units | Term Grade Points | Term GPA |
|---|---|---|---|---|
| 15.0 | 15.0 | 9.0 | 36.60 | 4.06 |

**End of Transcript**

April 02, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to give my enthusiastic support for Mr. Pablo Abir Das's application to clerk in your Chambers. I have known Pablo since April 2020 when I interviewed him for enrollment in the International Human Rights Clinic at the University of Southern California ("USC") Gould School of Law, which I direct. He was one of eight students invited to participate in the Clinic in the 2020-2021 academic year after a competitive interview and application process. During his time in the Clinic as a student attorney, he worked on average 20 hours per week.

In the Clinic, I supervised Pablo on two projects. Both involved monitoring the trials of journalists and human rights defenders in Morocco and Kyrgyzstan with the Clooney Foundation's TrialWatch Initiative. This work involves training of local monitors to attend the trial's hearings for purposes of taking detailed notes and collecting the case file; in-depth interviewing of defense counsel on the case as well as legal experts and human rights experts on the legal system in-country; and researching international human rights standards and jurisprudence with respect to a fair trial. All of this work is done for purposes of drafting and publishing a report analyzing and rating the fairness of the trial under international standards in order to deter Kyrgyzstan, Morocco and other countries from weaponizing their judicial system against political opponents and dissidents critical of the government. During his time in the Clinic, in addition to the above mentioned activities, Pablo played the leading role in researching and assisting me (as a TrialWatch expert) with drafting a trial monitoring report of a trial against journalist Omar Radi, ultimately concluding that the trial was riddled with violations of fair trial rights that Morocco is bound to uphold under international human rights law including: violations of the right to presumption of innocence; the right not to be arbitrarily detained or subjected to inhumane treatment; the right to call and examine witnesses; and the right to an impartial tribunal.

Having worked closely with Pablo, and having clerked myself on the 11th Circuit U.S. Court of Appeals, I can say that he is exactly the sort of individual that makes for an ideal law clerk. First, Pablo is very intelligent and is a quick learner. This became evident not only from the high quality of his work product, but also from my discussions with him in our seminar class and supervision meetings. He was well-prepared, and his questions and comments were always quite insightful and relevant as we discuss the assigned reading and how to apply the law to the facts of a particular case.

Second, Pablo has strong research and writing skills. He quickly grasps complex issues, researches them thoroughly (displaying ease in working with treaty, international jurisprudence, and foreign law in addition to U.S. law sources for purposes of my Clinic), and turned around a solid draft efficiently and effectively. His organizational skills were exceptional. He conducted research with determination and turned around very solid first drafts effectively. With some clear feedback and guidance on his first drafts, which he incorporated well, his writing became even more organized, consistent and clear over time.

Third, Pablo displayed a hard work ethic and always completed his Clinic work in a professional manner, multi-tasking between his Clinic projects with ease. In spite of the lengthy and complex research and drafting assignments for the TrialWatch work, he produced several drafts along the way for my review, appropriately seeking further guidance on a regular basis, and responding well to constructive feedback. Pablo always had a deep understanding of the facts of the cases and took time each week to ensure he was up to date on them, including monitoring news reports and staying in touch with counsel.

As a result of all of the above, I was delighted to invite Pablo back to the Clinic during his third year of law school to enroll in my Advanced Clinical course where he continued on with the TrialWatch work, but also helped to supervise two new second year Clinic student attorneys. In that role, he found the perfect balance of leading while also empowering the new students to gradually take over the processes for which he had been primarily responsible. With respect to his grades, Pablo easily stood out in the Clinic, and I awarded him the second highest grade in the class for his first year, a 3.9 (A), and a 4.1 (A+) during his second year as an Advanced Clinical student.

Finally, I would point out that Pablo has had work experience observing Judges through his Clinic work. As such, he has a good understanding of the judicial role as well as the intense demands and complex issues that Judges face. He is also well-attuned to understanding and working within different jurisdictions, adjusting to differing procedural and substantive rules well.

On a more personal level, Pablo is a confident, grounded young man with a nice sense of humor. In his work, I found that he was utterly dependable and responsible. He took initiative and was not afraid of challenges. He is the sort of person that anticipates the needs of his supervisors before they do. Not only did he work well independently, but he was also a team player. In all of his assignments for the Clinic, he worked closely with one to three other students and exhibited excellent communication and collaboration skills. The teams review each other's research and drafting, maintain the case files, and lead seminar classes together on their casework. In the team setting, Pablo played a natural leadership role, leading by example. If there was one area to critique Pablo on, it would be that he perhaps tends to take on too much and, as a result, sometimes failed in the Clinic to pay sufficient attention to detail. He improved on that over time. In sum, Pablo is a real pleasure to interact with both

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

professionally and socially.

For these reasons, I highly recommend Pablo as a clerk in your Chambers. If you need any further information about him, please do not hesitate to write or call.

Best Regards,

Hannah Garry

Hannah Garry - hgarry@law.usc.edu - 213-740-9154

April 02, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

Pablo Das is one of the strongest clerkship candidates whom I have recommended in my career, over thirty years. Every few years a student comes along who impresses me deeply with a combination of intellectual horsepower, personal drive and public-spirited values. This year, that student is Pablo Das.

Pablo was in two of my classes, first-year structural constitutional law and an upper-class course in constitutional rights. He absolutely excelled in both. The first-year course was the year that the world turned upside-down with Covid, and my class was entirely on zoom. This was an incredibly difficult time for students, who found themselves isolated and even more insecure than first-year students normally feel. Pablo was a clear standout in maturity, dedication, and brilliance in his performance in class. And in the rights course the following fall, he earned an A+.

A brief story will illustrate both the depth of my belief in Pablo and why he deserves it. In the fall of Pablo's 2L year, a distinguished scholar who was joining our faculty asked me if I knew a talented student who could help her with an important empirical project regarding the emergency docket of the Supreme Court, and I immediately thought of Pablo, who enthusiastically allowed me to suggest his name. The problem was, my colleague had not yet officially joined our faculty and so there was no funding to pay a research assistant. I went back to Pablo to say, too bad it didn't work out. His response was that he "needed more to do" and was so excited to work on the project that he would be happy to do it without compensation. Being on the law review and garnering all A+ grades that fall semester was apparently not enough to keep him busy. So he went to work, and my friend was thrilled with his help. Indeed she named him as a co-author on the project (not a normal procedure for a research assistant), and their piece was cited in the New York Times.

The reason Pablo is so impressive is, in part, his boundless intellectual energy. He brought that energy to class, and but for a slow start his first semester and the law school's decision to make the Covid semester pass-fail, he would likely be at the very top of the class rather than a hair's breadth below the top. He brought that energy to his many endeavors in law school, all devoted to public service: serving as an extern at the U.S. Attorney's Office, dedicating himself to the International Human Rights clinic, serving on the executive board of the Law Review, volunteering with a voting protection initiative, serving as Vice President of our student chapter of the American Constitution Society—a platform he used to highlight the issue of voting rights. Pablo will eventually work for the government, and a clerkship will help him enhance his fluency with all aspects of public law.

You will find Pablo to be an extremely positive addition to any team on which he works. He is indefatigable and upbeat, concerned and empathetic, generous and responsible. These attributes mean that he is not only very smart but also able to use his talents to constructive ends. He is a joy to have around. He has my highest recommendation.

Very truly yours,

Rebecca L. Brown
The Rader Family Trustee Chair in Law

Rebecca Brown - rbrown@law.usc.edu - 213-740-1892

April 02, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I strongly recommend that you hire Pablo Das to clerk in your chambers. I met Pablo in my Money in Politics seminar during the fall semester of 2020, when we were all teaching remotely. Pablo wrote a phenomenally strong paper for the seminar, which empirically explored the relationship between voting rights restrictions and campaign finance deregulation at the state level. Pablo is brilliant, creative, and diligent. He is also professional, warm, and kind. I tried to get him to apply for Ph.D. programs, but he was ready to get out in the world and work on issues that are important to him. At last check, he wanted to do this as a government lawyer, especially focused on voting rights, education, and the environment. I am certain that he will be successful as a law clerk, and I know that we will benefit from having him advocate for the public. I am thrilled to write this letter for him.

In my Money in Politics seminar, I encourage the students to write their seminar paper about a topic of interest to them. Pablo's topic was among the most politically astute topics a student has ever chosen. He noticed that political conservatives tend to be for restricted voting rights and against campaign finance regulation. But this is perplexing, since the main justification for regulating voting is fraud prevention, and the justification for regulating campaign finance is corruption prevention. He gathered data on voting rights and campaign finance regulation in the fifty states and analyzed the relationship between their co-occurrence in states. His main finding is that the correlation is not strong at all, surprisingly. He wrote case studies analyzing the areas in which the correlations were strongest.

As I helped Pablo think through the piece, I was exceptionally impressed with his attention to detail and forward thinking. He carefully considered his measurement choices and pushed hard on the measures to test the robustness of the relationships he found. He paired this careful empirical work with thorough legal and scholarly research. He quickly and adeptly familiarized himself with the relevant literature – most of it very recent – and also masterfully explained to the reader the rationales behind the tiers of constitutional scrutiny and the relevant caselaw containing that jurisprudence.

It will not surprise you to learn that the note was published in the Southern California Law Review. Most notes are not published, of course, but this one is so good that it was a no-brainer. In fact, I am adding it to my syllabus this year – it will be an optional reading, but my students who are interested in both voting rights and campaign finance will learn a lot from it. Pablo has since gone on to publish more work jointly with Professor Lee Epstein, who is one of the top political scientists working on judicial behavior and public policy. That she has worked with him twice – once for an op-ed, and once for a law review piece – speaks to how extremely good he is at this work. (She hasn't even worked with me yet! Pablo is amazing!)

In watching him work on this piece, I came to strongly believe that Pablo would absolutely dominate a social science Ph.D. program, helping push the frontier of our understanding around law and policy. Alas, while his area of interest is still voting rights, he wants to approach it as a practitioner. This is lucky for the legal community and unlucky for us social scientists.

Finally, on a personal note, Pablo is simply a terrific person. He reaches out when he wants to know people, follows through, and is genuinely interested in the lives of his friends and colleagues. He is also curious in a delightful way: my co-author, Jake Grumbach spoke with my class the semester that Pablo took Money in Politics. Pablo emailed me when Jake's book came out to tell me that he read and enjoyed it. I wish every student were as curious and every alumnus as communicative as Pablo. Whoever hires him as a clerk will have the great fortune of hiring someone who is a delight to work with and to mentor.

If I can further help you in your deliberations, please be in touch via email (awood@law.usc.edu). Thank you for your consideration of this wonderful attorney.

Best regards,

Abby K. Wood

Professor of Law, Political Science, and Public Policy
USC Gould School of Law

**PABLO AABIR DAS**
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Writing Sample

This writing sample is an excerpt of a final paper I wrote for my Money in Politics seminar with Professor Abby Wood. I later converted the paper into a Note that was published by the *Southern California Law Review*. The paper was the winner of the Beverly Hills Bar Association Rule of Law Competition.

Using both a legal and a data-based analysis, the paper argues that state legislatures and courts inconsistently regulate campaign financing and voting, which is unjustifiable and also harms democratic principles.

For brevity, I have only included the introduction and the argument section of the paper. The complete Note can be found on the *Southern California Law Review* website.

# VOTING AND CAMPAIGN FINANCING: INCONSISTENCIES IN LAW AND POLICY

## I. INTRODUCTION

The right to vote in elections and the right to spend[1] in elections are both historically revered rights that function as critical elements of American democracy.[2] These rights have earned their salience because they are two of the most common and accessible mechanisms by which Americans can participate in the democratic process. In different ways, each right enables citizens to express their views of their elected representatives and to support causes they identify with, ultimately ensuring that government remains responsive to the needs of the electorate. Due to their vital roles within the democratic process, condoning the restriction of one of these rights while overlooking the regulation of the other undermines democratic principles.

Despite their shared value to democratic participation, the Supreme Court analyzes the right to vote and the right to spend through distinct doctrinal lenses. The Court's differential analysis manifests in significant regulation of voting but a more laissez-faire approach to spending. As a result, voting and spending rarely reference each other in jurisprudence and are infrequently compared. This has led to limited scholarship contrasting the Supreme Court's legal analysis of each right and even less of an examination into how the two rights relate at a policy level. Such a comparison is instructive when evaluating the transparency and integrity of the American electoral process. Indeed, if two core democratic rights are treated differently by both courts and

1. For the purpose of this Note, I am borrowing Professor Robert Yablon's concept of the "right to spend," which encompasses both political contributions and political expenditures. As both Professor Yablon and this Note point out, the Supreme Court has assessed regulations pertaining to contributions and expenditures differently, and when it is necessary to distinguish the Court's legal framework around these two issues, this Note will do so. *See* Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. 655, 658 n.9 (2017).

2. The first federal campaign finance law was passed in 1876, when the Naval Appropriations Bill became the first enacted law regulating how citizens could contribute to elected representatives. *See History of Campaign Finance Regulation*, BALLOTPEDIA, https://ballotpedia.org/History_of_campaign_finance_regulation [https://perma.cc/FAA3-VCCG]. Voting rights date back even further to the country's founding, but until the Fourteenth Amendment was adopted in 1868, such rights were primarily controlled by state legislatures.

legislatures, then the rationale behind such divergent treatment should be scrutinized. This Note explores how voting rights and spending rights interact at both the judicial and state policy levels. This Note's central argument is that voting and spending are closely related activities that are jointly paramount to the functioning of American democracy and, as a result, the inconsistent regulation of these two issues in jurisprudence and state-level policy is unjustified and detrimental to the democratic process.

This is a timely moment to explore the intersection of voting and spending, as both issues have come to the forefront of public discourse over the past several years. Since 2016, the media has prominently covered issues of voting integrity, and these concerns served as the primary flashpoint in the 2020 presidential election. Landmark court decisions like *Crawford v. Marion County Election Board*[3] and *Shelby County v. Holder*[4] contributed to the prevalence of voting rights issues, as both cases, in different ways, endorsed states' broad authority to impose voting restrictions. On the spending side, the last two presidential elections enjoyed historic contributions from major donors and political action committees ("PACs"),[5] while independent expenditures also reached an all-time high. This dramatic increase in political contributions and expenditures has underscored concerns around the sizable influence of money in politics. Moreover, in contrast to voting rights, spending rights are often protected by the Supreme Court. Notably, key decisions in *Citizens United v. FEC*[6] and *McCutcheon v. FEC*[7] limited states' ability to regulate campaign financing.

Policy developments around these rights are actively playing out in state legislatures across

3. Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (plurality opinion).
4. Shelby County v. Holder, 570 U.S. 529 (2013).
5. A political action committee is an independent expenditure committee that typically spends money in support of a political candidate.
6. Citizens United v. FEC, 558 U.S. 310 (2010).
7. McCutcheon v. FEC, 572 U.S. 185 (2014) (plurality opinion).

the country. Since the 2020 elections, in response to unverified allegations of mass voter fraud, dozens of states have introduced bills to restrict voting access.[8] These bills have impeded voter registration options, limited vote-by-mail accessibility, and strengthened voter ID requirements. There is no indication that there is similar state-level interest to regulate spending. In fact, some state legislatures have relaxed campaign finance restrictions.[9] The reluctance of policymakers to take action on regulating spending is especially striking given that dark money groups[10] spent hundreds of millions of dollars in undisclosed political expenditures during the 2020 elections.[11]

Such policy shifts partially stem from the Supreme Court's divergent treatment of voting and spending rights. Disputes over voting restrictions, on the one hand, are typically analyzed under the Fourteenth Amendment to determine if a given voting law violates the Equal Protection Clause.[12] Challenges to spending laws, on the other hand, are usually evaluated under the First Amendment to establish whether a spending regulation excessively or improperly regulates free speech.[13] As a result of this bifurcated analysis, the Supreme Court tends to defer to states' discretion regarding voting laws while being wary of regulating spending due to sacrosanct First Amendment concerns.[14]

8. Ari Berman, *361 Voter Suppression Bills Have Already Been Introduced This Year*, MOTHER JONES (Apr. 1, 2021), https://www.motherjones.com/politics/2021/04/361-voter-suppression-bills-have-already-been-introduced-this-year [https://perma.cc/EW9W-PFFX]; *see also Voting Laws Roundup: February 2022*, BRENNAN CTR. FOR J. (Feb. 9, 2022), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022 [https://perma.cc/VN43-FLTU].

9. *See, e.g.*, Alex Sakariassen, *Pair of Bills Would Rewrite Montana's Campaign Finance Laws*, MISSOULA CURRENT (Feb. 20, 2021), https://missoulacurrent.com/government/2021/02/campaign-finance [https://perma.cc/JEV7-BZ3L].

10. Dark money groups are political nonprofit entities that have no legal obligation to disclose their donors. With minimal regulation or oversight, these groups often spend undisclosed amounts of money in support of political candidates.

11. *See* Anna Massoglia, *'Dark Money' Groups Pouring Millions into 2020 Political Ads with Even Less Disclosure*, OPENSECRETS (Sept. 11, 2020, 3:15 PM), https://www.opensecrets.org/news/2020/09/dark-money-pouring-920 [https://perma.cc/35J4-H6CT].

12. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189–91 (2008) (plurality opinion).

13. *See* Citizens United v. FEC, 558 U.S. 310, 339–50 (2010).

14. While the Court's differential posture toward voting rights and spending rights has remained largely consistent since the late 1900s, this doctrinal divergence has been particularly prominent over the past decade. Since the 2010 elections, in the face of legal challenges, states have successfully adopted a variety of restrictions around voting rights, including additional voter ID laws, barriers to voter registration, limitations on absentee voting, and more. In fact, "[i]n 2016, [fourteen] states had new voting restrictions in place for the first time in a presidential election." *New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (Nov. 19, 2019), https://www.brennancenter.org/our-work/research-reports/new-voting-restrictions-america [https://perma.cc/T7UG-FJVL]. On the other side, the Court has weakened states' capacity to regulate campaign financing—especially the regulation of expenditures. *See* Pamela S. Karlan, *The Supreme Court, 2011 Term—Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 32 (2012) ("A striking feature of the Roberts Court is that, when it comes to the act of voting, the Justices are decidedly less skeptical of government restrictions [than campaign finance regulations].").

As the integrity of American elections comes under close scrutiny over the next several years, clearly defining the scope of voting rights and spending rights will be increasingly important. The Supreme Court has already recognized the significance and interrelation of these two rights and grouped them together under a broader "right to participate," defined as the most basic right in democracy.[15] Nevertheless, the Court continues to afford each right a differing level of judicial protection.

This Note explores both the Court's doctrinal divergence, as well as state-level policies regulating either right, in three Parts. The first Part describes the Supreme Court's legal analysis of both voting rights and spending rights. It proceeds to provide an overview of each right's respective legal framework as well as the notable cases that define each right. The Part concludes by evaluating the public policy imperatives that drive the regulation of either right. Through this jurisprudential comparison, this Part suggests that while the Court applies different levels of scrutiny to voting and spending regulations, the underlying public policy rationales that drive the regulation of these rights are almost identical.

In the second Part, this Note transitions to the policy realm and explores whether the state laws that regulate voting and spending actually further public policy imperatives such as election integrity. The analysis relies on a score-based methodology that calculates how many key spending regulations or voting restrictions each state has adopted. This score is then used to rank how regulatory each state is toward voting and spending, respectively. Ultimately, these scores determine that the policy disparity between voting restrictions and spending regulations is not as stark as the Court's doctrinal divergence. Moreover, this Part argues that although the overall

15. McCutcheon v. FEC, 572 U.S. 185, 191 (2014) (plurality opinion) ("There is no right more basic in our democracy than the *right to participate* in electing our political leaders. Citizens can exercise that right in a variety of ways . . . [,] [including] vot[ing] . . . and contribut[ing] to a candidate's campaign." (emphasis added)).

policy disparity is not pronounced, on a granular level, there are certain voting or spending laws that can predict the absence—or presence—of other voting or spending laws.

In the third Part, this Note argues that both the states' and the Supreme Court's approaches to regulating voting versus spending are unjustified and damage the basic principle of equal participation that underpins the political system. This Part first responds to arguments in defense of the existing regulatory disparity and then proceeds to lay out how this divergence negatively affects democratic values and practices.

## III. THE RISKS OF INCONSISTENT REGULATION

### A. OVERVIEW

The tension between restrictive voting laws and lax spending regulations is indicative of both courts' and legislatures' broader attitude toward election integrity. Repeatedly, even absent any evidence of fraud, voting rights have been trampled under the pretense of election integrity, while spending has remained less regulated. This Part will argue that this divergence is unjustified and undermines fundamental democratic principles.

Defenders of the status quo usually justify the puzzling dichotomy between voting restrictions and spending regulations with the constitutional defense: spending has been classified as a freedom of speech issue and voting as an equal protection issue. However, such a defense fails to explain the varying treatment of different spending regulations, is based on the incorrect assumption that hyperregulation of voting makes elections fairer, and is inconsistent with historical beliefs and the contemporary reality that both voting and spending regulation play a comparable role in ensuring election integrity and protecting democratic ideals.

Proponents of the constitutional defense often argue that the integrity of the voting process is

critical to the functioning of democracy; thus, voting restrictions are defensible in order to ensure that the system is fair and equal. However, these restrictions have led to a system that is all but fair and equal. The disenfranchisement of those without IDs, those incarcerated, or those unable to vote on Election Day due to accessibility issues undermines the very purpose of a representative democracy, since millions of votes are not cast. Moreover, while sensible voting restrictions certainly have a place within the democratic process, it is unclear whether states that have adopted stricter voting restrictions have actually experienced lower levels of voter fraud.[16]

Finally, the constitutional defense implies that voting and spending somehow operate on different democratic planes and that the hyperregulation of voting will lead to more integrous elections. This presumption is flawed for both historical and contemporary reasons. The Founders believed that democratic governance contained two key components: first, a government that "deriv[es its] just powers from the consent of the governed,"[17] and second, elected representatives that prioritize the interests of their constituents above their own.[18] In other words, from its inception, American democracy has been predicated not only on voting integrity but also on the expectation that elected representatives are devoid of corruption and beholden only to the will of their constituents.[19] In the modern election setting, voting and spending have joint importance in the roles that they play in getting candidates elected. While voting is often the focus of elections, the financing of the political process is similarly important. Spending is not only key for candidates' messaging and outreach but also is also important as an avenue for citizens to participate meaningfully in the democratic process.

16. *See* Elaine Kamarck & Christine Stenglein, *Low Rates of Fraud in Vote-by-Mail States Show the Benefits Outweigh the Risks*, BROOKINGS INST. (June 2, 2020), https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks [https://perma.cc/92VG-E4RX].

17. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

18. STEPHEN BREYER, ACTIVE LIBERTY 15–16 (2005).

19. *See* Daniel I. Weiner & Benjamin T. Brickner, *Electoral Integrity in Campaign Finance Law*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 101, 116 (2017) (arguing that electoral integrity is measured by a process that "effectuates the will of the voters and . . . does not create incentives that subsequently undermine the loyalty of elected leaders to their constituents").

### B. THE CASE OF GEORGIA

Georgia best illustrates how many legislatures address election integrity, as it serves as a microcosm of the election integrity debate unfolding across the country. After the 2020 presidential election, President Trump alleged widespread voter fraud across the country, including in Georgia.[20] President Trump's allegations led to numerous lawsuits in the state and forced it to undergo two recounts and certify President Biden's victory multiple times.[21] Ultimately, in addition to certifying President Biden's win, Georgia election officials conducted a thorough investigation, concluding that there was no evidence of widespread voter fraud in the state.[22] Despite this determination, months later the Republican-controlled Georgia state legislature passed a sweeping voting-restriction bill. This bill included limitations on mail-in voting options, unlimited challenges to a voter's registration status, and additional voter ID requirements.[23]

While the Georgia bill has received harsh public criticism for its restrictiveness, what has received less attention is the fact that the bill was passed as the state simultaneously expanded spending rights, even in the face of serious campaign finance concerns. In 1974, Georgia was one of the few states that passed an ethics law creating a commission to oversee the role that money played in state politics.[24] This commission grew for over thirty years and, in 2008, closed over one hundred ethics cases related to campaign finance violations and collected hundreds of thousands of dollars in civil penalties.[25] However, from 2008 to 2013, the state cut the commission's budget

20. Reality Check Team, *Georgia Election: Donald Trump's Phone Call Fact-Checked*, BBC NEWS (Jan. 4, 2021), https://www.bbc.com/news/election-us-2020-55529230 [https://perma.cc/W3KB-XR38].

21. Amanda Zoch, *Georgia Completes Second Statewide Recount*, NAT'L CONF. STATE LEGISLATURES (Dec. 9, 2020), https://www.ncsl.org/research/elections-and-campaigns/georgia-completes-second-statewide-recount-magazine2020.aspx [https://perma.cc/U4ED-XC34].

22. Associated Press, *Investigators Say 'No Fraudulent Absentee Ballots' in Georgia County*, PBS (Dec. 30, 2020, 11:44 AM), https://www.pbs.org/newshour/politics/watch-investigators-say-no-fraudulent-absentee-ballots-in-georgia-county [https://perma.cc/J48H-ELB3].

23. Tessa Stuart, *Everything You Need to Know About Georgia's New Voting Law*, ROLLING STONE (Mar. 26, 2021, 11:18 AM), https://www.rollingstone.com/politics/politics-news/georgia-voting-bill-brian-kemp-voter-suppression-1147493 [https://perma.cc/8VSJ-A5HL].

24. COMMON CAUSE GA., ETHICS REFORM IN GEORGIA 1 (2018), https://www.commoncause.org/georgia/wp-content/uploads/sites/9/2018/03/Common_Cause_Georgia_Ethics_Report_2016.pdf [https://perma.cc/5QNL-3623].

25. *Id.* at 2.

by over forty percent, reducing its staff by nearly seventy percent.[26] After the dramatic downsizing of the commission's budget and capacity, in 2019 the remaining few members of the commission proceeded to raise state campaign contribution limitations.[27] This retreat from campaign finance oversight culminated in more "dark money" spending in the 2020 Georgia elections than any other congressional election.[28]

Despite the large amount of political spending in 2020, the Georgia state legislature has failed to meaningfully regulate such activity or even bolster disclosure laws in an effort to improve transparency.[29] In this sense, Georgia is an example of the current state of affairs when it comes to regulating voting versus spending. Although state election officials conclusively declared that no election fraud took place, the state legislature took a bevy of steps to restrict the free exercise of voting under the pretense of "election integrity." However, in the face of evident election integrity issues regarding dark money spending and campaign finance violations, the legislature is silent.

### C. AN UNJUSTIFIED DIVERGENCE

As this Note observed in Part II, the regulatory paradox present in Georgia is not unique but instead is part of an established trend of inconsistent regulation of voting versus spending. At its core, this inconsistency has been justified by a belief that voter fraud is more damaging to American democracy than campaign finance violations. That is, voter fraud can fundamentally change the results of an election and undermine the democratic process, whereas campaign finance

26. *Id.*

27. Benjamin Keane & Robert Sills, *Georgia Campaign Finance Commission Raises Limits on State Election Contributions*, JD SUPRA (May 7, 2019), https://www.jdsupra.com/legalnews/georgia-campaign-finance-commission-42746 [https://perma.cc/4UX9-U84Z].

28. Ciara Torres-Spelliscy, *Dark Money in the 2020 Election*, BRENNAN CTR. FOR JUST. (Nov. 20, 2020), https://www.brennancenter.org/our-work/analysis-opinion/dark-money-2020-election [https://perma.cc/9P2C-UF2T]; Anna Massoglia, *Digital Ad Bans End for Georgia Runoffs, Opening the Door to More 'Dark Money,'* OPENSECRETS (Dec. 16, 2020, 1:41 PM), https://www.opensecrets.org/news/2020/12/digital-ad-bans-end-for-georgia-senate-runoffs [https://perma.cc/S35X-AQ9Z].

29. In February 2021, the Georgia Senate passed a bill that allowed the "governor, lieutenant governor, a party's nominee for those positions, and House and Senate Republican and Democratic leaders [to] create [leadership] committees," to which "lobbyists, industry associations or businesses" could donate as much money as they like. James Salzer, *Georgia Senate GOP Passes Bill to Get More Money from Big Political Donors*, ATLANTA J.-CONST. (Feb. 26, 2021), https://www.ajc.com/politics/georgia-senate-leaders-push-bill-to-get-more-money-from-big-political-donors/D3YV4C3NZNCEPG6TJ5PCABGPH4 [https://perma.cc/3ZBB-NNXD].

violations do not pose as profound of a threat. This argument notably overlooks how institutions treat allegations of voter fraud versus claims of campaign finance violations.

In recent decades, voter fraud—such as the use of fake IDs or manipulated mail-in ballots—has been exceedingly uncommon. Even when it happens, fraud rarely takes place on a scale significant enough to actually influence an election. However, even if voter fraud did exist at the level that voting-restriction proponents claim it does, immediate and often effective remedies exist for voting violations. Claimants of voter fraud can place the election results on hold until the alleged issue is adequately investigated. Consider the 2020 race for Iowa's 2nd Congressional District as an example. At the end of the voting period, Republican Mariannette Miller-Meeks led Democrat Rita Hart by only six votes.[30] Hart then claimed that ballots were improperly counted and proceeded to file claims with both the state canvassing board and the U.S. House of Representatives.[31] The House of Representatives refused to certify a winner and prepared to proceed with an investigation although they did not ultimately do so, since Hart withdrew.[32] Nevertheless, the various institutions available to investigate Hart's claim serve as a reminder that when elections are close and there are claims of ballot irregularities, there are a number of immediate remedies available to candidates.

The rapid adjudication of voting irregularities is best appreciated when contrasted with the remedies available for campaign finance violations. First, there are more windows for campaign finance violations to occur than for voter fraud to occur. While voter fraud takes place solely during the voting process, campaign finance issues arise during campaigning, elections, and even once an

30. Ben Kamisar, *Iowa Democrat Rita Hart Files Challenge to Six-Vote Defeat in the House*, NBC NEWS (Dec. 22, 2020, 9:45 AM), https://www.nbcnews.com/politics/meet-the-press/blog/meet-press-blog-latest-news-analysis-data-driving-political-discussionn988541/ncrd1252095 [https://perma.cc/BC8T-CLSX].
31. *Id.*
32. *Id.*

official is in office. If violations do arise, then the remedy is often slow, arduous, and, depending on the relevant disclosure laws, hard to detect. Once again, Georgia can serve as a useful example. In 2019, former Georgia Senator David Perdue was fined $30,000 for campaign finance violations.[33] Senator Perdue was penalized for accepting hundreds of thousands of dollars in campaign contributions that both exceeded the contribution limit and came from prohibited entities.[34] What was often overlooked in the coverage of Senator Perdue's penalty was the fact that the violations occurred five years prior, in 2014, during a race he ultimately won.[35] Unlike claims of voter fraud, which are often quickly apparent due to the closely monitored nature of elections, Senator Perdue's infractions were not detected until half a decade later, and when they were detected, his fine was a fraction of the amount of money he illegitimately received.

These examples are not to suggest that voting should have no restrictions, and campaign finance should be heavily regulated. Instead, they show that the inconsistent regulation of these similarly important rights is unjustified. Moreover, as the next section shows, the system as it exists has a detrimental impact on the modern democratic system.

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*Writing sample concluded. For the complete Note, please visit the Southern California Law Review website.*

33. Russ Bynum, *Sen. Perdue's Campaign Fined $30,000 for Fundraising Violations*, PBS (Apr. 19, 2019, 6:28 PM), https://www.pbs.org/newshour/politics/sen-perdues-campaign-fined-30000-for-fun draising-violations [https://perma.cc/B9G5-M62H].
34. *Id.*
35. *Id.*

## Applicant Details

| | |
|---|---|
| First Name | **Michelle** |
| Last Name | **David** |
| Citizenship Status | **U. S. Citizen** |
| Email Address | **madavid@uchicago.edu** |
| Address | **Address**<br>Street<br>**633 S Plymouth Ct**<br>City<br>**Chicago**<br>State/Territory<br>**Illinois**<br>Zip<br>**60605**<br>Country<br>**United States** |
| Contact Phone Number | **8475284100** |

## Applicant Education

| | |
|---|---|
| BA/BS From | **Northwestern University** |
| Date of BA/BS | **June 2019** |
| JD/LLB From | **The University of Chicago Law School**<br>**https://www.law.uchicago.edu/** |
| Date of JD/LLB | **June 1, 2024** |
| Class Rank | **School does not rank** |
| Law Review/Journal | **Yes** |
| Journal(s) | **University of Chicago Law Review** |
| Moot Court Experience | **No** |

## Bar Admission

## Prior Judicial Experience

| | |
|---|---|
| Judicial Internships/ Externships | **No** |

| | |
|---|---|
| Post-graduate Judicial Law Clerk | **No** |

## Specialized Work Experience

## Recommenders

Kim, Hajin
hajin@uchicago.edu
773-702-9494
Templeton, Mark
templeton@uchicago.edu
773-702-9494
Macey, Joshua
jmacey@uchicago.edu

**This applicant has certified that all data entered in this profile and any application documents are true and correct.**

**MICHELLE DAVID**
633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

June 14, 2023

The Honorable Jamar Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman U.S Courthouse
600 Granby St.
Norfolk, VA 23510-1915

Dear Judge Walker:

I am a rising third-year law student at the University of Chicago Law School, and I am applying for a clerkship in your chambers for a one-year term beginning in 2024. Because clerkships are one of the best ways to continue developing my analytical and writing skills while affording me the opportunity to learn from a wide range of attorneys handling fast-paced issues, I would be grateful to begin my career as a clerk. More than that, I also care deeply about community-building and mentorship, so I would look forward to working with a close-knit team. After clerking, I will pursue a public interest career in the environmental justice space on behalf of low-income communities and communities of color.

I am confident that my writing and research abilities have prepared me to succeed as a clerk. Since beginning law school, for example, I drafted a 121-page initial brief with the Abrams Environmental Law Clinic to advocate for affordable and clean energy for low-income, BIPOC communities. More recently, I authored a forthcoming article in the *University of Chicago Law Review* on the toxic legacies of uranium mines and co-authored a separate forthcoming article in the *CUNY Law Review* on Asian American voting rights. Each project involved an area of law that was new but rewarding to learn, and these experiences have instilled in me a finer attention to precise language and style.

Additionally, I bring strong communication and collaboration skills. As the team captain of my undergraduate Model UN team, I received multiple "Best Delegate" awards for my advocacy and collaboration. I further developed those skills in a full-time role as a Pricing & Legal Project Management Analyst, where I learned how to work closely with partners on matter pricing strategy. As a community leader with Asian Americans Advancing Justice | Chicago, I mentored and led our volunteer team—including organizing planning and lobby meetings—to help pass a bill requiring Illinois public schools to integrate Asian American history into their curricula. Lastly, this past year, I collaborated with my teams in the Environmental Law Society and Asian Pacific American Law Students Association to invite speakers to discuss a variety of justice-focused topics, including on voting rights, affirmative action, environmental justice, and Indigenous-led litigation.

Beyond my background, I am a fast learner with a strong work ethic and know how to ask questions when necessary, and I would be grateful for the opportunity to work with you. I have included my resume, writing sample, and transcript for your review. Thank you for your time and consideration.

Sincerely,

Michelle David

# MICHELLE DAVID

633 S. Plymouth Ct., Apt. 407, Chicago, IL 60605 | madavid@uchicago.edu | (847) 528-4100

## EDUCATION

**University of Chicago Law School** — **Chicago, IL**
*Juris Doctor* — *Expected June 2024*

JOURNAL: Managing Editor, *University of Chicago Law Review*
COMMENT: *Clean Up Your Act: The U.S. Government's CERCLA Liability for Uranium Mines on the Navajo Nation* (forthcoming, *University of Chicago Law Review*)
ACTIVITIES: President, Environmental Law Society; Programming Director, APALSA

**Northwestern University** — **Evanston, IL**
*Bachelor of Arts, cum laude, in Political Science, with minors in Environmental Policy & Economics* *June 2019*

THESIS: *Empowerment & Silence at COP 21: An Ethnographic Analysis of Indigenous Activism*
AWARDS: McGovern Prize for Academic Excellence & Leadership, Environmental Policy Certificate of Honor (for environmental citizenship & service)
HONOR SOCIETIES: Phi Beta Kappa, Pi Sigma Alpha (political science)
ACTIVITIES: Chief of Staff, Model UN; President, Alpha Phi Omega (community service fraternity)

## EXPERIENCE

**Natural Resources Defense Council** — **Chicago, IL**
*Legal Intern, Litigation Team* — *Expected Aug. 2023–Dec. 2023*

**Arnold & Porter** — **Chicago, IL**
*Summer Associate* — *May 2023–July 2023*

**Federal Energy Regulatory Commission, Commissioner Allison Clements** — **Washington, D.C. (Remote)**
*Legal Intern* — *Jan. 2023–May 2023*

- Researched environmental justice agency guidance, *Chevron*, and the APA for three gas pipeline orders
- Met with community-based groups, and provided feedback on panel questions for a justice-related event

**University of Chicago Law School, Abrams Environmental Law Clinic** — **Chicago, IL**
*Clinic Intern, Michigan Energy Team* — *June 2022–May 2023*

- Drafted the initial and reply briefs for energy justice clients in a rate case against an electric utility
- Collaborated with clients to draft testimony and discovery in an integrated resource planning case

**Asian American Legal Defense and Education Fund** — **New York, NY (Remote)**
*Voting Rights Intern* — *Sept. 2022–Dec. 2022*

- Conducted poll monitoring and exit polling during both the general and runoff elections in Georgia
- Drafted observation letters detailing violations of voting rights in counties with high AAPI populations
- Co-authored an article on threats to § 208 of the Voting Rights Act (forthcoming, *CUNY Law Review*)

**Jenner & Block** — **Chicago, IL**
*Pricing & Legal Project Management Analyst* — *Sept. 2019–Sept. 2021*

- Collaborated with partners to optimally price and approve alternative fee arrangements firm-wide
- Customized task-based budgets, fee analysis reports, and task list management tools for attorneys

**Illinois Coalition for Immigrant and Refugee Rights** — **Chicago, IL**
*Policy Intern* — *Jan. 2019–June 2019*

- Produced legal and policy research on immigration detention, enforcement, and state legislative efforts
- Created congressional fact sheets with immigration voting records, campaign finances, and census data

**Chicago Council on Global Affairs** — **Chicago, IL**
*Global Water Intern, Global Food & Agriculture Program* — *Sept. 2018–Dec. 2018*

- Drafted and edited sections of a law journal article on environmental migrants and refugee law
- Prepared memos on nutrient pollution, farmer-led irrigation, and water infrastructure for reports

## INTERESTS

Community Organizing, Audiobook Memoirs, Sewing, Catan, NPR Podcasts

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

## Key to Transcripts of Academic Records

**1. Accreditation:** The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

**2. Calendar & Status:** The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

**3. Course Information:** Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

**4. Credits:** The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

**5. Grading Systems:**

**Quality Grades**

| Grade | College & Graduate | Business | Law |
|---|---|---|---|
| A+ | 4.0 | 4.33 | |
| A | 4.0 | 4.0 | 186-180 |
| A- | 3.7 | 3.67 | |
| B+ | 3.3 | 3.33 | |
| B | 3.0 | 3.0 | 179-174 |
| B- | 2.7 | 2.67 | |
| C+ | 2.3 | 2.33 | |
| C | 2.0 | 2.0 | 173-168 |
| C- | 1.7 | 1.67 | |
| D+ | 1.3 | 1.33 | |
| D | 1 | 1 | 167-160 |
| F | 0 | 0 | 159-155 |

**Non-Quality Grades**

| | |
|---|---|
| I | **Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB). |
| IP | **Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation. |
| NGR | **No Grade Reported:** No final grade submitted |
| P | **Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses. |
| Q | **Query:** No final grade submitted (College only) |
| R | **Registered:** Registered to audit the course |
| S | **Satisfactory** |
| U | **Unsatisfactory** |
| UW | **Unofficial Withdrawal** |
| W | **Withdrawal:** Does not affect GPA calculation |
| WP | **Withdrawal Passing:** Does not affect GPA calculation |
| WF | **Withdrawal Failing:** Does not affect GPA calculation |
| | **Blank:** If no grade is reported after a course, none was available at the time the transcript was prepared. |

**Examination Grades**

| | |
|---|---|
| H | Honors Quality |
| P* | High Pass |
| P | Pass |

**Grade Point Average:** Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

**6. Academic Status and Program of Study:** The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

**7. Doctoral Residence Status:** Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

**Scholastic Residence:** the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

**Research Residence:** the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

**Advanced Residence:** the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

**Active File Status:** a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

**Doctoral Leave of Absence:** the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

**Extended Residence:** the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

**8. Law School Transcript Key:** The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

**9. FERPA Re-Disclosure Notice:** In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

A PHOTOCOPY OF THIS DOCUMENT IS NOT OFFICIAL

THE UNIVERSITY OF CHICAGO

**Name:** Michelle Angela David
**Student ID:** 12334869

## University of Chicago Law School

### Academic Program History

Program: Law School
Start Quarter: Autumn 2021
Current Status: Active in Program
J.D. in Law

### External Education

Northwestern University
Evanston, Illinois
Bachelor of Arts 2019

### Beginning of Law School Record

Autumn 2021

| Course | | Description | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAWS | 30101 | Elements of the Law<br>Lior Strahilevitz | 3 | 3 | 177 |
| LAWS | 30211 | Civil Procedure<br>Emily Buss | 4 | 4 | 176 |
| LAWS | 30611 | Torts<br>Adam Chilton | 4 | 4 | 177 |
| LAWS | 30711 | Legal Research and Writing<br>Alison Gocke | 1 | 1 | 177 |

Winter 2022

| Course | | Description | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAWS | 30311 | Criminal Law<br>Jonathan Masur | 4 | 4 | 175 |
| LAWS | 30411 | Property<br>Aziz Huq | 4 | 4 | 180 |
| LAWS | 30511 | Contracts<br>Douglas Baird | 4 | 4 | 176 |
| LAWS | 30711 | Legal Research and Writing<br>Alison Gocke | 1 | 1 | 177 |

Spring 2022

| Course | | Description | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAWS | 30712 | Legal Research, Writing, and Advocacy<br>Alison Gocke | 2 | 2 | 178 |
| LAWS | 30713 | Transactional Lawyering<br>Joan Neal | 3 | 3 | 180 |
| LAWS | 43220 | Critical Race Studies<br>William Hubbard | 3 | 3 | 177 |
| LAWS | 44201 | Legislation and Statutory Interpretation<br>Ryan Doerfler | 3 | 3 | 182 |
| LAWS | 47201 | Criminal Procedure I: The Investigative Process<br>John Rappaport | 3 | 3 | 177 |

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

| Course | | Description | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAWS | 43228 | Local Government Law<br>Lee Fennell | 3 | 3 | 177 |
| LAWS | 48215 | Modern American Legal History<br>William J Novak | 3 | 0 | |
| LAWS | 90224 | Abrams Environmental Law Clinic<br>Mark Templeton | 2 | 0 | |
| LAWS | 94110 | The University of Chicago Law Review<br>Anthony Casey | 1 | 1 | P |

Winter 2023

| Course | | Description | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAWS | 43282 | Energy Law<br>Joshua C. Macey | 3 | 3 | 181 |
| LAWS | 46101 | Administrative Law<br>David A Strauss | 3 | 3 | 178 |
| LAWS | 53462 | Tragedies and Takings: Selected Topics in Land Use and Resource Allocation<br>Lee Fennell | 3 | 0 | |
| LAWS | 90224 | Abrams Environmental Law Clinic<br>Mark Templeton | 2 | 0 | |
| LAWS | 94110 | The University of Chicago Law Review<br>Anthony Casey | 1 | 1 | P |

Spring 2023

| Course | | Description | Attempted | Earned | Grade |
|---|---|---|---|---|---|
| LAWS | 40301 | Constitutional Law III: Equal Protection and Substantive Due Process<br>Aziz Huq | 3 | 3 | 178 |
| LAWS | 46001 | Environmental Law: Air, Water, and Animals<br>Hajin Kim | 3 | 3 | 179 |
| LAWS | 53404 | The Role and Practice of the State Attorney General<br>Michael Scodro<br>Lisa Madigan | 3 | 0 | |
| LAWS | 90224 | Abrams Environmental Law Clinic<br>Mark Templeton | 1 | 0 | |
| LAWS | 94110 | The University of Chicago Law Review<br>Anthony Casey | 1 | 1 | P |
| Req Designation: | | Meets Substantial Research Paper Requirement | | | |

### End of University of Chicago Law School



Date Issued: 06/12/2023

Hajin Kim
Assistant Professor of Law
University of Chicago Law School
1111 E 60th St.
Ph: 773.702.9494 | Email: hajin@uchicago.edu

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am eager to recommend Michelle David as a clerk in your chambers. Michelle is the most competent research assistant I have ever worked with, and a delightful person to boot. Michelle's grades, while above-median, wildly understate her excellence.

I first got to know Michelle last summer when she applied to be a part-time research assistant (RA) for me. Michelle helped on multiple aspects of a project considering the influence of Environmental, Social, and Governance (ESG) metrics. She was fantastic, and I wish I could have hired her full-time. She supervised an undergraduate RA for me, and every week prepared a clear, actionable memo detailing what the two had completed, open questions (with all necessary context), and proposed next steps. Michelle got up to speed with a new dataset, downloaded the information we needed, and prepared an extensive literature review on the use of various ESG metrics in prior research. Her summaries were concise and research memos so well-organized and helpful that I now use her literature review memo as a model for other research assistants. And she did all of this work part-time, in a fraction of the hours I am used to seeing other RAs require for comparable work.

After the summer, Michelle asked me to supervise her comment. Michelle wrote about CERCLA liability for uranium mines on the Navajo Nation. I have nothing but admiration for both Michelle's process and ultimate work product. On process, Michelle proactively created deadlines for each paper milestone (outline, rough draft, final) and used that to create a schedule of feedback check-ins with me that she scheduled at the start of the quarter. The final paper is excellent and far better than any other comment I have yet supervised. Michelle clearly lays out the problem of unremediated uranium mines, taking the reader through a brief tour of military history along the way. She explains why prior attempts to compensate victims have failed and then proposes using CERCLA liability for the U.S. government to partially address the issue. Her legal analysis is crisp and clear—not an easy feat when discussing the intricacies of CERCLA. Michelle quickly gets to the hardest issues and references a wide range of relevant circuit and district court decisions in making her case. I was not at all surprised when the Law Review selected Michelle's comment for publication.

I also taught Michelle this past quarter in Environmental Law. Michelle was always prepared for class, came to office hours with insightful questions on how the law might apply in practice, and did a great job on the exam—her issue spotter answer was among the top scores.

I would be remiss if I wrote a letter about Michelle and did not mention her sterling personal qualities, though I hardly know where to begin. Michelle is professional and poised—mature beyond her years and self-reflective. She takes feedback well and runs with it. She's a joy to chat with and kind. Most of all, she is deeply committed to helping others and giving back. And it is because of her deep commitments outside of the classroom (she has done several internships and co-authored several papers, been on Law Review, worked close to 10 hours a week on the Environmental Law Clinic, served as the Environmental Law Society President, and volunteers on campaigns) that I feel her grades do not accurately portray her potential. Michelle uses so much of her time in service of others. When she allows herself to put her attention on one area—as she would with a clerkship—she is a total rockstar.

Finally, Michelle's success is especially impressive given her background. Her family's financial circumstances were always precarious, but right before Michelle began college, her mother lost her job. In college, Michelle always worked at least two part-time jobs, more than 20 hours a week, to send money home. She moved in with her grandmother to save rent, and so had a 1.5-hour commute with a half-hour walk each way to get to campus. Yet she speaks glowingly about her time in college—she is particularly passionate about building up Northwestern's Model UN team.

I would be delighted to speak more at length about Michelle's candidacy if at all helpful.

Sincerely,

Hajin Kim
Assistant Professor of Law

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

**Re: Clerkship Recommendation Letter for Michelle David**

Dear Judge Walker:

Michelle David is the top student out of more than 250 students I have worked with in my twelve years directing the Abrams Environmental Law Clinic and teaching at the University of Chicago Law School, and I give her my highest possible recommendation. In her first summer after law school, when she worked as a full-time law clinic intern, Michelle wrote approximately 100 pages—more than five-sixths—of an initial brief that we filed before the Michigan Public Service Commission (MPSC). Since then, she has ably contributed to her client's goals by performing multiple outstanding legal research projects, writing compelling direct and rebuttal testimony, and drafting critical portions of other briefs and filings. Michelle is exceptional—hard-working beyond belief, thoughtful and insightful, generous, warm-hearted, and deeply committed to her colleagues and clients. By example, she pushes me and her team to do our best work. I would hire her in a second if I could.

Throughout Michelle's time at the clinic, she has primarily worked on two cases before the MPSC: (1) a "rate case" in which a regulated electric utility—DTE Electric Co.—requested the Commission's permission to increase rates on customers, and (2) an "integrated resources plan" case in which the same utility submitted a long-term estimate of customer demands for electricity and a plan for the supply of generation resources the company would use to meet that demand. Through those cases, Michelle worked with our clinic team and our Detroit-based grassroots clients to fight for energy justice for all, especially for low-middle-income and Black, Indigenous, and People of Color (BIPOC) communities whom the energy system has historically harmed.

Michelle sought out this energy justice work in the first place after seeing firsthand how her family struggled to pay their bills growing up, including their utility bills. Michelle not only helped her mom pay these bills throughout college, but she also still helps her grandmother pay utility bills today. Additionally, because Michelle has volunteered as a community organizer on both local issue-based and electoral campaigns since 2020, I know she was excited to work directly with community-based organizations as a clinic student. These experiences have enabled Michelle to understand even better some of the challenges our clients face and to advocate on their behalf more effectively.

As I indicated in my opening paragraph, Michelle has drafted substantial amounts of written work filed by the clinic. As one example, Michelle was the primary drafter for an initial brief for the rate case. The initial brief represents one of the most comprehensive explanations of our client's positions, totaling approximately 120 pages and spanning eight core issue areas. She wrote that brief in less than seven weeks, starting with no knowledge of energy law in general, the relevant legal standards in Michigan, the history of prior proceedings, or the details of DTE's request—which spanned approximately 30 witnesses and 3,000 pages of submissions—or those of our clients and other intervenors—of similar scope as the DTE materials. She converted our clients' ambitious—arguably beyond scope—requests into clear, concise, and well-supported arguments. In that case, Michelle also took ownership over drafting another forty pages for the reply brief, exceptions (filed in response to the Administrative Law Judge's Proposal for Decision), and replies to exceptions. For her second case, the integrated resource plan case, Michelle worked with our team and expert witness to draft direct testimony, where she took primary responsibility over the sections advocating for our client's positions on energy efficiency, community solar, and distributed generation. Our expert witness founded our client due to community concerns about DTE's failures to include historically-disadvantaged communities in the energy transition, so I needed to have my most capable student—Michelle—drafting that portion of his direct testimony.

In addition to her excellent writing ability, Michelle researches new problems and solutions efficiently and thoroughly. For example, in preparing direct testimony on community solar and energy efficiency, Michelle found recent reports and research that supported our advocacy. Since I had worked on these issues for this client for almost seven years, it was easy for me to rely on what I knew and not look for new materials. Michelle convinced me that we could—and should—do better for our client and found additional resources that substantially improved the quality of the factual support for our positions. In that same case, in preparing for an upcoming initial brief, Michelle also prepared research on Michigan's integrated resource planning statute as well as current federal and state environmental laws. Again, this is an area in which I had assumed we would make the same arguments as we always make, but Michelle showed me through her research that we could sharpen our arguments and make them substantially stronger.

Michelle has shown that she works effectively alone as well as collaboratively in groups. For her initial brief assignment, she took ownership of the project, managing workflow from initial research to the final proofing and filing stages. While she can work independently when required, she also enjoys working on small teams. She voices her own opinions in both team-wide and internal-student meetings while also making space for others to participate and contribute. Michelle respectfully speaks up when she thinks the client, the team, and I are heading down the wrong path. She also enjoys the iterative process of swapping drafts with others, including helping to edit others' work and learning from others' feedback. I have seen firsthand how her comments and edits on a fellow student's draft have significantly improved her colleague's work.

Less glamorously but also critically, Michelle volunteers to take on new tasks when needed. For example, she organized the team's effort to sift through and summarize more than 800 pages of testimony supplied by one of our electric utilities in a new and

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upcoming rate case. I have also appreciated that she often volunteers to take on projects that are needed but may be less captivating, such as creating discovery tracking spreadsheets, preparing slide decks summarizing our clinic's work, onboarding new members of the team, and uploading necessary discovery and testimony files to our shared folders. I rely on her heavily—as essentially a senior associate—to keep the team functioning smoothly and headed in the right direction. This was particularly important to me, her team, and her client this year because I was the clinic's sole supervisor for twenty students across five teams —my junior colleague having left at the beginning of the year to run Northwestern Law School's environmental colleagues—and because we were without a legal assistant for three months.

I cannot write Michelle strongly enough. She is extraordinary: the quality of her research, writing, client engagement, and commitment to her work, her team, and her client set a new high-water mark for the clinic. She will be a valuable asset to you and your chambers. Please do not hesitate to contact me at templeton@uchicago.edu or 773-702-6998 if I can assist further.

Respectfully,

Mark Templeton
Clinical Professor of Law
Director, Abrams Environmental Law Clinic

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June 14, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my pleasure to write this letter of recommendation in support of Michelle David. I know Michelle well. I hired her as a research assistant in summer 2022, taught her in my Energy Law class, and supervised her Law Review Comment, which will be published in the coming months. Michelle is extremely intelligent, hard-working, and compassionate. She would make a terrific law clerk. I recommend her without reservation.

Michelle has all the usual characteristics of successful law clerks. Her grades are excellent. She is the managing editor of the Chicago Law Review. She has emerged as a leader in her class.

But one thing that does not come across from her resume or transcript is that Michelle is an absolute force of nature. This initially took me by surprise. She is humble and soft-spoken. She never brags about herself. But her will and her work ethic are beyond anything I've seen in a student. My colleague Hajin Kim and I asked Michelle to help us study unanticipated consequences of recent trends in corporate governance and corporate sustainability. We are particularly concerned that ESG campaigns are causing large publicly-traded firms to sell assets to private companies with worse environmental records.

Michelle did an amazing job. She had no experience with corporate law. The research tasks were unpleasant and complex. She had to track down databases and convince regulators to share data they were not required to share under open records laws. Over the course of the summer, Michelle tracked down and compiled all the information we needed. I had submitted open records requests the previous year to get this information. They were universally denied. Michelle was ruthless in pestering with regulators, directing them to the proper legal authority when they denied her requests, and tracking down all the information Hajin and I needed—often before we ourselves knew the information was available or useful

Since last summer, I've gotten to know Michelle well both personally and intellectually. All our interactions have confirmed my initial view that Michelle is an brilliant woman who will have an impressive and meaningful legal career. Michelle wrote one of the strongest exams in my forty-three-person Energy Law class. Michelle's Law Review Comment (Chicago's version of Law Review Notes) considers the application of Comprehensive Environmental Response, Compensation, and Liability ACT (CERCLA) to orphaned uranium mines. Michelle's Comment makes novel doctrinal point; she conducted significant original research in tabulating the orphaned uranium mines in the United States; and she avoided the primary sin of most law review comments, which is to let her normative priors color her views about the right legal question.

I should also say a few things about Michelle's background. Michelle was born in the Chicago and moved to Atlanta when she was nine. Unlike many top law students, Michelle does not come from privilege. She was raised almost entirely by her mother, who is a Thai immigrant and who worked as a server at Thai restaurants and a barista at Starbucks. Because her family was always financially stressed, Michelle was not allowed to play youth sports or participate in many other extracurricular activities. To study music, she had to find funding to support her. When her mother lost her job the year she started college, her family went on food stamps and welfare. As a result, during Michelle's first year of college, she ended up working twenty hours a week so that she could send money back to her family. She also moved in with her grandmother to save money on rent. Unfortunately, that required her to spent more than an hour commuting to and from classes.

I mention all this because it underscores how remarkable it is that Michelle has consistently reached enormous levels of professional and academic success. Despite the many demands on her time, Michelle has been a leader in every educational and professional environment in which she's found herself. She directs Chicago's Environmental Law Society. In that capacity, she organized a talk on "Environmental Racism in Chicago" with a community organizer from the Southeast Side who had worked on the Stop General Iron campaign. She set up a toxic tour that was led by the Black-led community-based organization People for Community Recovery of the area surrounding Altgeld Gardens. She also set up Chicago's first "Indigenous Environmental Justice" talk.

Some of the most interesting conversations I've had with Michelle involve the socioeconomic biases of law school. For example, Michelle has told me that she has felt excluded from many core law review experiences because she could not afford the $128 admission to Barrister's Ball or participate in the public interest auction.

As I hope is clear, I think the world of Michelle. She is highly intelligent, humble, and deeply committed to her family and to public service. She would be a terrific law clerk. Please do not hesitate to contact me if you have any further questions.

Sincerely yours,
Joshua C. Macey

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## WRITING SAMPLE

I prepared a Comment on the U.S. government's liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) for unremediated uranium mines on the Navajo Nation. The attached writing sample is an excerpt from an early draft of that Comment and includes the Introduction, some of the factual background (Section I.A, Section I.B), and some of the legal analysis (Section II.B.2). For the purpose of this writing sample, I have also omitted or adjusted some content for length, but I have included below the abstract and full table of contents for context.

This draft reflects edits that are primarily my own, though I received general feedback during Fall 2022 on the overall substance and direction of the Comment. I am currently in the process of revising my Comment, but it has already been accepted for publication and is forthcoming in the *University of Chicago Law Review*. It follows the *Law Review*'s specific style guide.


ABSTRACT

*This Comment delves into the Cold War legacy of uranium mining on the Navajo Nation. Today, unremediated hazardous waste from more than five hundred deserted mines has continued to poison the health and lands of the Navajo. This Comment argues that the federal government is ultimately liable for the remediation of these mines under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Specifically, because the federal government held legal title to the mining lands and tightly managed the mining operations, the federal government satisfies CERCLA's liability regime for "owners" and "operators." The U.S. government's liability under CERCLA warrants fuller attention by the U.S. Environmental Protection Agency (EPA), Congress, and states in order to achieve the complete, long-overdue remediation of these mines.*


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# Clean Up Your Act: The U.S. Government's CERCLA Liability for Uranium Mines on the Navajo Nation

## INTRODUCTION

The Navajo Nation[1] is located across approximately twenty-seven thousand square miles of the U.S. Southwest at the corner of Arizona, New Mexico, and Utah.[2] It is home to nearly half of the Tribe's four hundred thousand enrolled members[3] as well as over five hundred deserted uranium mines.[4] Between World War II and the Cold War, these mines produced significant quantities of uranium ore under the U.S. government's direction in order to fuel the government's wartime nuclear ambitions. During this time, ore produced on Navajo lands totaled approximately thirty million tons[5] or approximately 14% of total U.S. uranium production.[6] Once uranium ore had been mined, mills refined the ore into concentrated "yellowcake," which was then further enriched into fuel suitable for nuclear power plants or the cores of nuclear weapons.[7] Today, the hazardous waste left from the mining has severely and detrimentally impacted the health of the Navajo Nation, having led to a wave of cancers, deaths, and lifelong health problems.[8]

The cleanup of these mines has been slow and insufficient. Under the Comprehensive Environmental Response, Compensation, and Liability Act[9] (CERCLA), the U.S. Environmental Protection Agency (EPA) has held a number of companies responsible for the cleanup costs of uranium mines,[10] which include the

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1 Since 1968, "Navajo Nation" has been the official English name that the Navajo have adopted, and it is the name of the federally recognized tribe recognized by the U.S. government. *See Navajo History*, NAVAJO PEOPLE (Oct. 10, 2004), https://perma.cc/M5HE-LQQE. Before Spanish settlers introduced the term "Navajo," the Navajo traditionally referred to themselves as "Diné." TRACI B. VOYLES, WASTELANDING: LEGACIES OF URANIUM MINING IN NAVAJO COUNTRY, at xi (2015). Today, the Navajo use both "Diné" and "Navajo," *id.*, and this Comment will use "Navajo."

2 *History*, NAVAJO NATION (last updated Sept. 20, 2022), https://perma.cc/4FT3-ZT5S.

3 Simon Romero, *Navajo Nation Becomes Largest Tribe in U.S. After Pandemic Enrollment Surge*, N.Y. TIMES (May 21, 2021) https://www.nytimes.com/2021/05/21/us/navajo-cherokee-population.html (describing enrollment hikes from 306,268 in 2020 to 399,494 in 2021).

4 *The Health and Environmental Impacts of Uranium Contamination in the Navajo Nation: Hearing Before the Comm. on Oversight and Government Reform*, 110th Cong. 21 (2007); Kate Selig, *Can a New EPA Office Expedite Uranium Cleanup on Navajo Land? Not if Past Is Prologue.*, & THE W. (Nov. 2, 2020), https://perma.cc/BB6N-B773.

5 *Navajo Nation: Cleaning Up Abandoned Uranium Mines*, U.S. ENVTL. PROT. AGENCY (last updated Aug. 22, 2022), https://perma.cc/Y2AH-F3CJ (reflecting production levels from 1944–1986).

6 U.S. ENVTL. PROT. AGENCY, ABANDONED URANIUM MINES AND THE NAVAJO NATION: NAVAJO NATION AUM SCREENING ASSESSMENT REPORT AND ATLAS WITH GEOSPATIAL DATA, at vii (2007).

7 Barbara Johnston, Susan Dawson & Gary Madsen, *Uranium Mining and Milling: Navajo Experiences in the American Southwest*, *in* INDIANS & ENERGY: EXPLOITATION AND OPPORTUNITY IN THE AMERICAN SOUTHWEST 112 (Sherry Smith & Brian Frehner eds., 2010).

8 Lauren Morales, *For the Navajo Nation, Uranium Mining's Deadly Legacy Lingers*, NPR (Apr. 10, 2016), https://perma.cc/K3JU-LRXQ.

9 Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 42 U.S.C.).

10 *See generally, e.g.*, *Case Summary: Cleanup Agreement Reached at Former Uranium Mine on Spokane Indian Reservation*, U.S. ENVTL. PROT. AGENCY (last updated Aug. 23, 2022), https://perma.cc/XTA9-PXXK (referring to a 2012 settlement); *Case Summary: $600 Million Settlement to Clean Up 94 Abandoned Uranium Mines on the Navajo Nation*, U.S. ENVTL. PROT. AGENCY (last updated July 25, 2022), https://perma.cc/J6BM-E24N; Consent Decree, United States v. Newmont Mining Corp., 2:05-cv-00020, Dkt. No. 553 (Jan. 17, 2012) (requiring defendant companies to finance the cleanup of a uranium mine, following an initial, appealed trial court finding of CERCLA liability).

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cost to permanently "prevent or minimize the release of hazardous substances" from "caus[ing] substantial danger to present or future public health or welfare or the environment."[11] However, while the EPA has successfully obtained financing from companies for this kind of cleanup (or "remediation") at certain mines, the EPA has not obtained financing for hundreds of *other mines* where the companies involved have already gone out of business or otherwise cannot afford remediation. In these "orphaned" mines cases, generally no remediation has occurred.[12]

The remediation of hazardous uranium mines has life-and-death stakes. Almost all of the orphaned mines sit within one mile of a natural water source, and many sit within close proximity of Navajo homes—some even within two hundred feet.[13] Waste from the unremediated mines has contaminated Navajo drinking water and continues to spread through dust in the air.[14] Studies corroborate that those living near uranium mines face an increased risk of developing cancers, kidney diseases, respiratory diseases, tuberculosis, and other chronic diseases.[15] One recent study found that 26% of Navajo women possess uranium levels higher than those found in the "highest 5% of the U.S. population,"[16] and other studies have previously linked uranium contamination to birth defects and other unfavorable birth outcomes.[17] The ongoing and intergenerational legacies of these orphaned mines and the frustratingly slow pace of existing remediation efforts demand renewed attention and new solutions.

This Comment argues that, in the case of uranium mining, the federal government is itself liable for the contamination and, thus, remediation costs of orphaned uranium mines under CERCLA. Where hazardous substances from a site have contaminated an area, CERCLA holds any "owner" or "operator" of the site strictly liable and requires the liable party to fund all remediation efforts.[18] The federal government

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11 42 U.S.C. § 9601(24) (defining technically this kind of permanent cleanup operation as a "remedy" or "remedial action").

12 Selig, *supra* note 4 ("No mines have been cleaned up to date.").

13 Mary F. Calvert, *Toxic Legacy of Uranium Mines on Navajo Nation Confronts Interior Nominee Deb Haaland*, PULITZER CTR. (Feb. 23, 2021), https://perma.cc/MA84-TZFY ("Experts estimate that . . . 85 percent of all Navajo homes are currently contaminated with uranium.").

14 Cheyanne M. Daniels, *The US Nuclear Weapons Program Left 'a Horrible Legacy' of Environmental Destruction and Death Across the Navajo Nation*, INSIDE CLIMATE NEWS (June 27, 2021), https://perma.cc/ZWG4-MRKP.

15 *See* Susan E. Dawson & Gary E. Madsen, *Uranium Mine Workers, Atomic Downwinders, and the Radiation Exposure Compensation Act (RECA): The Nuclear Legacy*, *in* HALF-LIVES & HALF-TRUTHS: CONFRONTING THE RADIOACTIVE LEGACIES OF THE COLD WAR 117, 122–23 (Barbara R. Johnston ed., 2007).

16 Mary Hudetz, *US Official: Research Finds Uranium in Navajo Women, Babies*, ASSOCIATED PRESS (Oct. 7, 2019), https://perma.cc/9ZVK-Y7AB.

17 Johnston et al., *supra* note 7, at 121.

18 42 U.S.C. § 9607(a).

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was both an "owner" and "operator" of the uranium mines on Navajo lands. It not only held legal title to the Navajo lands where the mining took place, but it also extensively controlled the U.S. uranium market by directing uranium exploration efforts, determining uranium suppliers and production quotas, positioning itself legally as the sole buyer of uranium ore and enriched uranium, and manipulating mining contracts on Navajo lands to maximize production. As such, where no other solvent "owner" or "operator" can be identified for a particular mining site, the U.S. government should be held responsible for the cleanup costs.

This Comment proceeds in three parts. [Roadmap Omitted]

## I. THE PROBLEM OF UNREMEDIATED URANIUM MINES

[Roadmap Omitted]

### A. U.S. Uranium Mining Beginnings

[Background on the Creation of the Atomic Energy Commission (AEC) Omitted] By 1948, government-led exploration and procurement of uranium were in full swing.[19] For example, after first learning about some deposits of uranium ore on Navajo lands, the AEC mapped out a wide-scale exploration strategy and began encouraging companies to mine the large deposits on and near the reservation to support the war effort.[20] Navajos helped U.S. officials locate high-grade uranium deposits in exchange for promised jobs, discovery rewards, and economic prosperity.[21] Hopeful in the promise of this prosperity, several prominent Navajo leaders advocated for the expansion of uranium development, framing it as a new form of "Navajo nationalism" and as development on their own terms.[22] Fittingly, the twentieth-century uranium boom that swept across the Navajo Nation and elsewhere in the United States was termed "uranium fever."[23]

However, uranium mining was not all that it seemed to be. The federal government knew early on the health risks associated with radiation from the uranium mines, but it did not disclose those risks to miners

19 Doug Brugge & Rob Goble, *A Documentary History of Uranium Mining and the Navajo People*, *in* THE NAVAJO PEOPLE AND URANIUM MINING 25, 27 (Doug Brugge, Timothy Benally & Esther Yazzie-Lewis eds., 2006).

20 *See id.*

21 Johnston et al., *supra* note 7, at 111, 115–17.

22 ANDREW NEEDHAM, POWER LINES: PHOENIX AND THE MAKING OF THE MODERN SOUTHWEST 233–36 (2014). Other Navajo activists called for their own version of "Navajo nationalism" in which the Navajo Nation would break from the extractive and colonial nature of mining and other similar operations. *See id.* at 218.

23 Johnston et al., *supra* note 7, at 115 ("'[U]ranium fever' swept the United States . . . . Finding uranium, according to Gordon Dean, chairman of the AEC from 1950 to 1953, became a patriotic duty.").

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or their families for many years.[24] As early as the 1930s, the U.S. Public Health Service (PHS), an agency under the Department of Health and Human Services tasked with protecting the public health, had no doubt of the hazards posed by uranium mining due to comprehensive studies of uranium in Czechoslovakia and Germany.[25] Moreover, the PHS conducted its own epidemiological studies on the impact of radiation on the health of Navajo uranium miners beginning in 1949.[26] By 1950, the initial PHS results revealed radon exposures in mines on the Navajo Nation up to 750 times the acceptable limits.[27] By January 1951, internal records revealed that both PHS and AEC staff believed "radon [in uranium mines] was present in levels that would cause cancer."[28] Despite the evidence discovered during this time and over the course of a decade-long study on the health risks from uranium mining,[29] the PHS and AEC struck a deal with the mining companies to not "divulge the potential health hazards to the workers" or "inform those who became ill that their illnesses were radiation related."[30] This decision was part of an unethical compromise,[31] and it denied many miners crucial information about their health risks until at least the 1960s.[32]

Why did the federal government accede to this demand by the mining companies? PHS leadership did not want to "rock the boat" when it came to mining,[33] and the AEC was unwilling to risk the domestic uranium supply to any degree.[34] The AEC, in particular, continued to deny and downplay the mounting

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24 Brugge & Goble, *supra* note 19, at 33–34. [Background on Radiation and Uranium Omitted (citing PETER H. EICHSTAEDT, IF YOU POISON US: URANIUM AND NATIVE AMERICANS 47–49 (1994))]

25 EICHSTAEDT, *supra* note 24, at 56 (explaining that at least one of the uranium mines that was subject to these European studies was known as "Siebenschlenhen" or "death mine"); Brugge & Goble, *supra* note 19, at 26–27 ("In 1926, clinical evaluation defined the histopathology of the lung cancer in miners. By 1932, Germany and Czechoslovakia had designated cancer in these miners as a compensable occupational disease." (citations omitted)). In the United States, the Bureau of Labor Statistics had by 1929 also begun reporting radiation-related health risks for workers producing glow-in-the-dark watches and clocks. EICHSTAEDT, *supra* note 24 at 54–55 ("Grotesque . . . radiation poisoning had been documented in the early 1920s when factory workers in companies that produced luminescent dials began to lose their teeth, jaws, and finally their lives.").

26 EICHSTAEDT, *supra* note 24, at 51.

27 *Id.* at 52. In other instances, such as one mine on the Navajo Nation that was run by the Vanadium Corporation of America and whose miners were 95% Navajo, the readings of these mines in the worst cases exceeded the "allowable weekly doses [of radiation] in less than one day and were reaching total annual doses in just a week [by contemporary standards]." *Id.*

28 Doug Brugge & Rob Goble, *The History of Uranium Mining and the Navajo People*, 92 AM. J. PUB. HEALTH 1410, 1413 (2002) (describing the records of an internal meeting between the AEC and PHS on January 25, 1951).

29 Dawson & Madsen, *supra* note 15, at 122.

30 Johnston et al., *supra* note 7, at 120; EICHSTAEDT, *supra* note 24, at 65 (stating that miners with identified health problems were "only informed . . . *after* they had contracted a fatal disease" and with no notice that the problems could be radiation-related) (emphasis added).

31 Brugge & Goble, *supra* note 19, at 32 ("The centerpiece of the Nuremberg Code, promulgated in 1947 and widely publicized, was the provision of informed consent to persons enrolled in research studies. The PHS study clearly violated a central tenet of [that] standard of care.").

32 Dawson & Madsen, *supra* note 15, at 127.

33 Brugge & Goble, *supra* note 28, at 1413 (quoting Victor Archer, head of the PHS medical team).

34 VOYLES, *supra* note 1, at 112. President Harry Truman clarified the AEC's understood role in maximing production in his memoir: "The Joint Committee [on Atomic Energy, which oversaw the AEC,] was primarily concerned with atomic development[ ] . . . and [ ] was always pushing for more production." HARRY S. TRUMAN, MEMOIRS BY HARRY S. TRUMAN: VOLUME TWO: YEARS OF TRIAL AND HOPE 297 (1956).

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evidence for several years in order to achieve its uranium supply goals. In 1953, the AEC's chairman wrote to the Senate Joint Committee on Atomic Energy: "[T]he exposure accumulated to date by the individual miners in the uranium mines has not been sufficiently great to have produced injuries."[35] In 1954, while the AEC began experimenting with ventilation to reduce the radiation-related health risks and released a report recommending ventilation standards, its report ultimately did not require companies to install ventilation nor did it take up any other recommendations advocated by the PHS.[36] Of course, companies largely ignored these recommendations.[37] As the AEC's actions indicate, the agency was in the business of pursuing uranium development at all times and at any cost, including to health. [Paragraph Shorted for Length]

B. The Consequences and Broken Trust

[Background on U.S.–Navajo Trust Relationship Omitted] The Navajo only learned of the devastating consequences of the uranium once miners began to fall ill and die of cancers and other diseases in mass numbers.[38] Marie Harvey, the daughter of one Navajo uranium miner, recounted: [Block Quote Omitted] Marie's story is not uncommon. Professors Barbara Johnston, Susan Dawson, and Gary Madsen found that Navajo miners often "worked in dusty mine shafts, eating their lunch there, drinking water from sources inside the mine, and returning home to their families wearing dust-covered radioactive clothing."[39]

The hazardous waste produced by mining operations also contaminated the water supply and soil for the surrounding communities[40]—to say nothing of the fact that miners and their families frequently lived on-site in company-provided housing or lived nearby.[41] No one properly informed the Navajo about the dangers of kids playing on tall piles of the leftover ore ("tailings") or families building homes amid—and even at times with[42]—contaminated debris, further seeping uranium into all parts of Navajo life.[43] As a

35 EICHSTAEDT, *supra* note 24, at 69 (quoting Letter from Lewis L. Strauss, Chairman, Atomic Energy Comm'n, to W. Sterling Cole, Chairman, Joint Comm. on Atomic Energy (July 13, 1953)).
36 VOYLES, *supra* note 1, at 111 (explaining that the AEC did not oversee or enforce its ventilation recommendations).
37 EICHSTAEDT, *supra* note 24, at 71. [Note on Responsibility of Mining Companies Omitted]
38 Johnston et al., *supra* note 7, at 120–21.
39 *Id.* at 120.
40 *Id.* at 120–22; EICHSTAEDT, *supra* note 24, at 181–82.
41 Johnston et al., *supra* note 7, at 121–22, 124.
42 VOYLES, *supra* note 1, at 136–38 (explaining that companies used radioactive tailings as materials to build homes and other buildings).
43 Sherry Smith & Brian Frehner, *Introduction*, *in* INDIANS & ENERGY: EXPLOITATION AND OPPORTUNITY IN THE AMERICAN SOUTHWEST 1, 10 (Sherry Smith & Brian Frehner eds., 2010); VOYLES, *supra* note 1, at 139.

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result, not only did the miners battle cancer and early deaths, but the families of miners also experienced birth defects, miscarriages, throat cancer, skin lesions and sores, and cleft palates.[44]

[Summary of Navajo Response (Protests, Community Programming, Other Relief) Omitted]

C. Prior Attempts to Compensate Victims and Remediate Mines [Omitted]

## II. THE U.S. GOVERNMENT'S CERCLA LIABILITY

[Roadmap Omitted]

A. The Mechanics of CERCLA [Omitted]

B. The U.S. Government Is Liable for the Cleanup of Uranium Mines on Navajo Lands

[Roadmap Altered & Abbreviated] This Section argues that the U.S. government is liable under CERCLA for its involvement as an "operator" and "owner" of uranium sites on Navajo lands. [Text Omitted] As an initial matter, the definitions of owner and operator are not well defined by the statute. CERCLA does not define "owner" or "operator" in any instructive way—instead, it circularly defines each as a party that owns or operates a facility.[45] In response to this ambiguity, the courts have stepped in to design their own standards, often based upon the ordinary meaning of "owner" and "operator."[46] While some courts may disagree with one another in certain respects, courts universally agree that determining whether an actor is a PRP [Edit to Add: Potentially Responsible Party] is a fact-intensive inquiry that considers the totality of the circumstances.[47] This Section proceeds by first presenting the case for owner liability, the strongest case. It then presents the case for operator liability, the inquiry of which is highly fact intensive. [Text Omitted] The U.S. government is likely independently liable under both categories, given its strong property rights and extensive control of the uranium market. [Text Omitted]

1. Owner liability. [Omitted]
2. Operator liability.

*a) Case law defining "operator" liability.* Despite not directly owning a facility or incurring owner liability, an entity can still be held liable under CERCLA as an "operator." [Paragraph and Text Omitted

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44 VOYLES, *supra* note 1, at 141–42; Johnston et al., *supra* note 7, at 121.

45 Kiersten Holms, Note, *This Land Is Your Land, This Land is Mined Land: Expanding Governmental Ownership Liability Under CERCLA*, 76 WASH. & LEE L. REV. 1013, 1026 (2019). The Supreme Court labeled them "useless[ ]." United States v. Bestfoods, 524 U.S. 51, 66 (1998).

46 *See, e.g.*, Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1498 (11th Cir. 1996) (turning to state law to define the ordinary meaning of "owner" and "operator").

47 *See, e.g.*, Tosco Corp. v. Koch Indus., Inc., 216 F.3d 886, 892 (10th Cir. 2000).

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on *United States v. Bestfoods*[48]] "Operation" under CERCLA means "more than mere mechanical activation of pumps and valves, and must be read to contemplate 'operation' as including the exercise of direction over the facility's activities."[49] The Supreme Court in *Bestfoods* further specified: "[A]n operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[50] Importantly, the *Bestfoods* court also clarified that the question of operator liability is an inquiry into the relationship between the entity in question and the facility itself.[51] A court can only hold an entity liable as an operator if the entity had a certain degree of direct control over the facility itself—beyond simply a relationship to a separate entity that is actually directly controlling the facility.

In sharpening the *Bestfoods* standard, two additional points are instructive. First, even if the U.S. government does not directly enter into a contract with a facility and instead acts as a regulator over that facility, operator liability can still attach to the government if the regulation is sufficiently intense. In *FMC Corp. v. U.S. Department of Commerce*,[52] the dissent characterized the federal government's activity as purely "regulatory" in part because the government imposed certain regulations on but did not directly purchase from the facility in question—which produced rayon, a rubber substitute.[53] Rather than possessing a direct contract with the U.S. government, the rayon facility first sold its rayon to a separate company (for tire production) before the rayon made its way into the U.S. government's World War II vehicles.[54] Under these facts and in contrast to the dissent, the Third Circuit en banc reasoned that operator liability applies to the government as long as it effectively possesses substantial *actual* control over the facility. The court then held the U.S. liable as an operator because it "determined what product the facility would produce, the level of production, the price of the product, and to whom the product would be sold."[55]

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48 524 U.S. 51 (1998).
49 *Id.* at 71.
50 *Id.* at 66–67.
51 *Id.* at 67–68; *see also* MPR Props. Co., LLC v. United States, 583 F. Supp. 3d 981, 992, 996 (E.D. Mich. 2021), *appeal docketed*, No. 22-1789 (6th Cir. Sept. 8, 2022).
52 29 F.3d 833 (3d Cir. 1994) (en banc).
53 *See id.* at 854 (Sloviter, C.J., dissenting).
54 *See id.* at 835–36 (majority opinion); *see also id.* at 854 (Sloviter, C.J., dissenting).
55 *Id.* at 843 (majority opinion).

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Second, the operator standard requires affirmative acts by the PRP. Per the Sixth Circuit in *United States v. Township of Brighton*,[56] an operator must perform specific affirmative acts (rather than merely acts of omission),[57] and neither the plain *ability* to control[58] nor the plain *ability* to regulate[59] a facility will amount to operator liability. In 2020, the Third Circuit in *PPG Industries Inc. v. United States*[60] similarly stated that mere formal or general control over a facility is insufficient to attach operator liability.[61] Instead, relying on *Bestfoods*, the Third Circuit held that operator liability would additionally require "some indicia of control over the facility's polluting activities."[62] The Ninth Circuit[63] and a Michigan district court[64] agree.

In applying these "operator" standards to the Navajo uranium mines, the facts of three cases are most relevant. Each case is explained in turn below, before this Section then turns to comparing their facts to those of the uranium mines at hand. The first helpful case here, already mentioned *supra* in this Section, is *FMC*. Prior to World War II, the United States sourced 90% of its crude rubber supply from Asia, but this supply suddenly vanished following Pearl Harbor because most of this rubber was imported from Japanese-occupied territory.[65] In response, President Franklin D. Roosevelt empowered the War Production Board to "issue directives to industry" that dictated and expedited the production process for wartime goods such as rayon.[66] In light of this extensive power, *FMC* held the government liable as an operator of the rayon facility at issue in the case. The court reasoned that, because the government mandated rayon production, controlled the distribution of raw materials, and was the end user of almost all rayon, it essentially set the operating level and profit of each rayon company.[67] Moreover, the *FMC* court found that the federal government was directly tied to the hazardous waste generated. Because the waste was highly visible and inherent to the

56 153 F.3d 307 (6th Cir. 1998).
57 *Id.* at 315.
58 *Id.* at 314 (finding the "actual control" standard instructive, as opposed to the "ability to control" or "authority to control" standards).
59 *Id.* at 316; *see also* United States v. Sterling Centrecorp Inc., 977 F.3d 750, 758–59 (9th Cir. 2020) (finding the operator standard unmet because the government possessed only "general" wartime "regulatory authority" and had merely instructed the gold mine at issue to shut down).
60 957 F.3d 395 (3d Cir. 2020).
61 *Id.* at 403.
62 *Id.*
63 The Ninth Circuit held that operator liability requires "actual participation in decisions related to pollution." *Centrecorp*, 977 F.3d at 758.
64 In *MRP Properties Co. v. United States*, a Michigan district court stated: "*Bestfoods* 'sharpen[ed]' the definition of an 'operator' for CERCLA purposes by broadening the 'actual control' inquiry to include control over 'operations *having to do with* leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.'" 583 F. Supp. 3d 981, 995–96 (E.D. Mich. 2021).
65 *FMC*, 29 F.3d at 836.
66 *Id.*
67 *Id.* at 837.

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rayon production process, the federal government had knowledge of the vast amounts of hazardous waste generated.[68] Despite this knowledge, the government continued to "pressure" facilities to maximize production levels—levels that necessarily increased the amount of material disposed.[69] Lastly, the court found that the government increased hazardous waste by rejecting materials that did not adhere to stringent production specifications and by generating waste directly from its government-owned equipment.[70]

A second helpful case is *MRP Properties Co. v. United States*.[71] During World War II, the federal government created the Petroleum Administration for War (PAW), a national oil agency that "exercised significant control over"[72] the "prices, profits, and allocation of petroleum products and the raw materials needed to create them."[73] PAW was subdivided into regional districts—each of which "supervised, among other things, the production, refining, supply, transportation, distribution, and marketing of petroleum products."[74] Moreover, PAW planned oil production up to a year in advance—tracking production on a per-refinery basis and allocating monthly quantities to refineries[75]—and it reserved "final approval" over all oil production.[76] The relevant issue in *MRP Properties* was whether the United States was liable as an "operator" under CERCLA for its involvement in the domestic oil industry during World War II.[77] The court concluded on summary judgment that the federal government, through PAW, exercised sufficient control over twelve refineries such that the United States was liable as an operator under CERCLA.[78] In addition to pointing to PAW's control over the prices, profits, quantities, and raw materials necessary for oil production, the *MRP Properties* court was persuaded that the World War II defense market for oil was a monopsony,[79] a type of market where there is only one buyer. Because the U.S. government's monopsony created an unequal distribution of power between the U.S. government and the facility—where the facility

68 *Id.* at 837–38.
69 *Id.* at 838.
70 *FMC*, 29 F.3d at 838.
71 583 F. Supp. 3d 981 (E.D. Mich. 2021).
72 *Id.* at 987 (quoting *Shell Oil*, 294 F.3d at 1049).
73 *Id.*
74 *Id.* at 988.
75 *Id.*
76 *MRP Props.*, 583 F. Supp. 3d, at 988.
77 *Id.* at 991.
78 *Id.* at 998.
79 *Id.* at 999.

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was essentially at the will and whim of the government—the court concluded that the facility did not truly operate voluntarily or independently of the government.[80]

The third relevant case is *Exxon Mobil Corp. v. United States*,[81] in which a Texas district court held the U.S. government liable as an operator of two chemical plants[82] but declined to hold it liable as an operator for two oil refineries.[83] For the chemical plants, the *Exxon* court found that the government approved plant designs and required governmental approval for waste disposal plans, expenditures above $1,000, plant alterations, and employee salary and benefits.[84] The court also concluded that the government "knew" the facility was disposing of spent waste in open basins, and it delayed improvements in waste-processing at the plants in order to maximize production.[85] Knowledge of the increased waste along with the government's significant management of the facility justified operator liability.

In contrast to its conclusions regarding the chemical plants, the *Exxon* court found that the government's role regarding the oil refineries was more akin to that of a "very interested consumer" involved in voluntary, consensual—not coercive—contracts.[86] For the refineries at issue, the court found that the parties neither negotiated nor specified via contract the disposal activities,[87] and the government did not design, specify, or provide any of the refinery equipment.[88] The court further held that the government's general wartime "'authority to control'" private entities was not itself sufficient to confer PRP status because a "direct nexus" to decisions over waste disposal was necessary.[89]

*b) Applying the law to Navajo uranium mines that were active between 1948 and 1970.* The federal government's control over uranium mines on the Navajo Nation between 1948 and 1970 rises to the level of operator liability and closely follows the facts of the *FMC* rayon facility, *MRP Properties*' oil refineries,

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80 *Id.*
81 108 F. Supp 3d 486 (S.D. Tex. 2015).
82 *Id.* at 531–32.
83 *Id.* at 529, 532.
84 *Id.* at 531.
85 *Id.*
86 *Exxon*, 108 F. Supp. 3d at 523 (quotation marks omitted). An Idaho district court similarly held that the U.S. government was not an "operator" in its involvement in metal mining activities because the "mines and mills were not forced to produce" and instead simply "elected" to do so. Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1129 (D. Idaho 2003).
87 *Exxon*, 108 F. Supp. 3d at 525.
88 *Id.* at 526.
89 *Id.* at 524.

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and *Exxon* chemical plants. The federal government not only founded the U.S. uranium market but also drove and controlled it over several decades, particularly during the period between 1948 and 1970.[90] The Section proceeds by first discussing generally the AEC's control over the domestic uranium industry between 1948 and 1970, when most uranium mines on Navajo lands operated.[91] It then discusses circumstances specific to the Navajo that reinforce the U.S. government's liability for these mines. On the Navajo Nation, in particular, the U.S. government wielded extraordinary influence in setting the terms of mining contracts without meaningful consultation with the Navajo.

From 1948 to 1970, the federal government had a complete stranglehold on the domestic uranium market—one akin to, if not exceeding, the likes of *FMC*, *MRP Properties*, and *Exxon*. Key to the U.S. government's operator liability is that it directly managed mining operations on Navajo lands in order to achieve breakneck-speed production, leading to anticipated and known increases in waste and disregard for the consequences of poor waste disposal. The U.S. government achieved this level of control in two ways: (1) generally, it dictated the exploration of raw ore, set the price of the ore, and decreed itself the sole buyer of enriched uranium in the end use–market; and (2) specifically, it circumvented and displaced meaningful Navajo management of mining operations through hands-on negotiation and approval of mining contracts.

First, like in *MRP Properties* and *FMC*, the U.S. government established the "prices, profits, and allocation[s]"[92] for uranium mining operations so as to maximize production levels. In *MRP Properties*, PAW managed the raw materials necessary for oil production, set oil prices a year in advance, and maintained a monopsonistic market.[93] In *FMC*, the U.S. government similarly controlled the distribution of raw materials, set production levels, and was the end user of all rayon.[94] Here, the same is also true: the AEC managed exploration efforts and product requirements, set price guarantees for ore, and decreed itself the sole buyer and end user.

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90 *See* VOYLES, *supra* note 1, at 62 (2015) ("[T]he search for uranium has been the only government-induced, government-maintained, government-controlled mining boom in the nation's experience.") (quoting Herbert Lang, *Uranium Mining and the AEC: The Birth Pangs of a New Industry*, 36 BUS. HIST. REV. 325, 325 (1962)).

91 Brugge & Goble, *supra* note 19, at 28.

92 *MRP Props.*, 583 F. Supp. 3d at 987.

93 *Id.* at 987–88, 999.

94 *FMC*, 29 F.3d at 843.

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With respect to exploration and product requirements, the AEC tightly monitored the search for high-quality uranium ore. In 1948, the AEC, in coordination with the science- and resource-focused U.S. Geological Survey (USGS) launched a large-scale exploratory effort to identify uranium deposits on U.S. public lands, including airborne surveys and on-site drill tests.[95] If uranium was discovered, the AEC then leased the land to companies to mine.[96]

With respect to price controls, the AEC developed three- and ten-year price guarantees beginning in 1948 for the delivery of uranium ore to U.S. purchasing stations, along with bonuses for especially high-grade ore.[97] These newly constructed AEC purchasing stations were scattered throughout the West, and, at these sites, U.S. government contractors would weigh, inspect, and purchase the ore at the predetermined prices.[98] Moreover, the AEC even provided "haulage allowance[s]" to compensate mining companies for delivering the ore to these purchasing stations.[99] Through these on-the-ground purchasing stations, the AEC could tightly oversee and track production on a regional and per-mine basis. While the AEC adjusted its pricing schemes over time,[100] they remained a key fixture in the uranium industry through the end of the 1960s, fueling the United States' nuclear ambitions throughout much of the Cold War.[101] This national procurement program jolted the uranium industry into production and spurred a new generation of uranium explorers hoping to strike it rich.[102]

Lastly, with respect to maintaining a monopsony, the AEA installed the United States as the "sole legal buyer, refiner, and producer of uranium ore for atomic energy use" from the get-go.[103] As a result, private companies could legally sell uranium ore only to the federal government for further enrichment and use. The AEC did not begin breaking down this total monopsony until 1958, when it announced that AEC-licensed private companies could also purchase domestic yellowcake—enriched ore, as opposed to raw ore

95 MICHAEL A. AMUNDSON, YELLOWCAKE TOWNS: URANIUM MINING COMMUNITIES IN THE AMERICAN WEST 22 (2002).
96 *Id.* at 22.
97 *Id.*
98 *Id.* at 22. The government also financed new roads and airports to increase uranium accessibility. VOYLES, *supra* note 1, at 104–05.
99 CHARLES RIVER ASSOCS. INC., URANIUM PRICE FORMATION 3-13 (1977).
100 In 1962, the federal government ended its price guarantees for ore, but it replaced the ore price guarantees with mill price guarantees. *Id.* at 3-15. These mill guarantees still dictated ore rates, though less directly. *See id.* at 3-15 n.5 ("The AEC nonetheless controlled ore prices to some extent through the mill contracts. If ore prices were out of line, the AEC could exert pressure to correct this before signing the mill contract.").
101 *See* AMUNDSON, *supra* note 95, at 30–31.
102 *Id.* at 26 (recounting popular stories from the time that described "rags-to-riches" Americans, who were dubbed "'uraniumaires'").
103 *Id.* at 20; VOYLES, *supra* note 1, at 119.

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from mines—in order to develop a commercial nuclear energy industry.[104] No matter the buyer, however, the U.S. government maintained a monopoly on all domestic enrichment services for every uranium end use, meaning private companies were required to contract with the government for all enrichment services.[105] In other words, even though private companies could now buy yellowcake for commercial purposes, the yellowcake only reached their hands after the U.S. government first purchased the ore from uranium mines and then enriched it into yellowcake itself.[106] While the AEC began allowing private companies to purchase uranium ore directly from mines and mills in 1964,[107] the U.S. government remained the sole end user of ore from many companies through 1970.[108]

Beyond the U.S. government's general controls over mining, the government directly managed and oversaw mining contracts, and this was nowhere clearer than in the case of mining contracts on Navajo lands. When the AEC hoped to establish mining on tribal lands, it worked with the Bureau of Indian Affairs (BIA) to negotiate the contracts with private entities, then presented the contract to the Navajo Tribal Council for official approval.[109] Although the AEC advised the public that formal approval from the Navajo Tribal Council was required before exploration or mining activities could occur on Navajo lands—in accordance with the 1938 Tribal Mineral Leasing Act[110]—this approval was commonly disregarded or treated as mere formality.[111] The AEC or BIA often presented pre-negotiated mining contracts to the Navajo Tribal Council as economic development initiatives requiring only a final seal of approval.[112]

Before these contracts would have reached the tribal approval phase, the AEC would have already set the ore, milling, and haulage costs in the contracts and established production quotas.[113] Moreover, the AEC

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104 AMUNDSON, *supra* note 95, at 109.
105 *Id.*
106 *Id.*
107 *See* Private Ownership of Special Nuclear Materials Act of 1964, Pub. L. No. 88-489, 78 Stat. 602 (1964) (codified in scattered sections of 42 U.S.C.).
108 AMUNDSON, *supra* note 95, at 20, 23, 109; *see also* CHARLES RIVER ASSOCS., *supra* note 99, at 3-20 ("The AEC remained the only legal purchaser of [enriched uranium] until 1966, and commercial purchases for current delivery after 1966 were initially very small. AEC procurement ended entirely in 1970."). By the late 1960s, the uranium industry was faltering. AMUNDSON, *supra* note 95, at 106–07. As a result, the government allowed companies to defer their contracts—initially set to expire by 1966—through 1968 until the commercial industry could take off. *Id.* at 108. Through its "stretch-out" program, the United States promised to purchase uranium from deferring companies through 1970. *Id.*
109 Johnston et al., *supra* note 7, at 117.
110 Pub. L. No. 75-506, 52 Stat. 346 (1938); *see also* VOYLES, *supra* note 1, at 77.
111 VOYLES, *supra* note 1, at 64. Prospectors were unlikely to know how to seek tribal approval or if they were even on tribal lands. *Id.* at 66.
112 Johnston et al., *supra* note 7, at 117; VOYLES, *supra* note 1, at 81.
113 AMUNDSON, *supra* note 95, at 29; *see also* Testimony of Defendants' Expert Witness, Dr. Jay Brigham, El Paso Nat. Gas Co. v. United States, 3:14-cv-08165, Dkt. No. 196, at *30 (D. Ariz. Mar. 1, 2019) [hereinafter Brigham Testimony]:

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would only approve contracts once prospective companies had submitted proposals demonstrating their ability to meet strict AEC requirements regarding "ore supply, technical capability, and financial responsibility."[114] Once a company had met all of the requirements, however, the federal government intentionally made the path to profit easy for these companies, which received large benefits and allowances.[115] These contracts "open[ed] [Navajo lands] up to prospectors, miners, and, eventually, mills for processing the ore and mill tailings piles for dumping the inevitable waste."[116]

Importantly, while the Navajo did seek out and approve mining contracts in the hopes of spurring economic growth, the U.S. government manipulated the process. These contracts were designed to maximize production and consequently "degraded" rather than improved the Navajos' ability to benefit economically as a tribe."[117] And, once the leases were executed, the Navajo could not terminate them without approval from the U.S. Department of the Interior.[118] This one-way ratchet was especially problematic given the latent nature of radiation exposure, the effects of which could take years to appear.[119]

Furthermore, the balance of power between the AEC and Navajo was asymmetric, with the AEC wielding significant coercive power over the Navajo Nation, which was designated as a reservation and forced by the federal government into some degree of dependence.[120] One example of this dependence played out in the financing of roads on Navajo lands. In seeking funding for road construction throughout its lands, the Navajo found that the federal government was all too "eager[ ]" to build roads where the need from industry was great but not otherwise—in fact, the government was actively reluctant to build roads on Navajo lands if it was not connected to industry.[121] Professor Traci Voyles further characterizes the mining and milling labor that the Navajo supplied as a "forced choice" in many ways.[122] She explains that, given

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> Q[uestion:] . . . [T]he Navajo Nation was not involved in any of that [exploration or purchasing] activity, whether it be pricing of the uranium, . . . milling the uranium, any of the processes and procedures . . . ? A[nswer:] No. It just set what they wanted as a royalty rate.

114 AMUNDSON, *supra* note 95, at 29.

115 *See id.* (describing these contracts as "favorable" to the companies).

116 VOYLES, *supra* note 1, at 83–84.

117 VOYLES, *supra* note 1, at 83–85 (explaining, for example, that the AEC commonly negotiated contract terms that provided the "lowest possible cost" to industry and lowest royalty amounts to the Navajo, all of which the AEC framed as a benefit to the Navajo).

118 Brigham Testimony, *supra* note 113, at *49.

119 Dawson & Madsen, *supra* note 15, at 128 (reporting latency periods of between nineteen and twenty-five years).

120 VOYLES, *supra* note 1, at 84, 114–15; *see also* EICHSTAEDT, *supra* note 24, at 37–38 (explaining that the Navajo leadership understood the uranium activities to be economically beneficial at the time, but this understanding was without the wider context of the associated health risks).

121 See VOYLES, *supra* note 1, at 105–06.

122 *Id.* at 114–15.

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the federal government's insistence on uranium expansion and the limited nature of other job opportunities on Navajo lands, many Navajo workers were essentially coerced by the AEC and BIA into working in uranium mines and mills when no other opportunities were available.[123] Speaking of the economic pressure, Navajo miner Tommy James said, "[T]o say I wish I did not work is impossible . . . it is money that is used to get what is needed, such as food and clothing. Because of these needs, even though it may be dangerous, you will go there to work. That is how it is."[124] The AEC itself even recognized this power imbalance in a 1951 statement regarding tribal lands when it confirmed, "We have, undoubtedly, had some influence on the establishment of regulations and procedures for the operation of uranium mineral lands."[125]

In a sense then, here, the narrative spun by the *Exxon* court regarding the oil refineries—that the federal government was merely a "very interested customer" engaging in contracts that lacked an element of coercion[126]—seems less apt. Instead, it seems more plausible that the government certainly imposed a level of coercion on the Navajo and uranium mining contracts, or at least the government did not enter into contracts that were completely "voluntary" and "consensual" as the *Exxon* court found.[127]

Taken together, the U.S. government's general profit-setting control over the uranium market and its specific coercive management over Navajo contracts suggest that the U.S. government almost certainly satisfies the operator standard with regard to uranium mining between 1948 and 1970. The government's maximum-production campaign on both fronts clearly would have led to foreseeable increases in hazardous waste at mining facilities—which the government knew contaminated people and lands, as discussed in Part I *supra*. As a result, even if a court disagrees that the U.S. government is liable as an owner, the facts supporting operator liability are quite strong and support an independent finding of liability.

III. PRACTICAL CONSIDERATIONS [OMITTED]

CONCLUSION [OMITTED]

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123 *Id.*

124 Phil Harrison, *"It Was Like Slave Work": Oral History of Minor Tommy James*, *in* THE NAVAJO PEOPLE AND URANIUM MINING 117, 123–25 (Doug Brugge, Timothy Benally & Esther Yazzie-Lewis eds., Esther Yazzie-Lewis & Timothy Benally trans., 2006).

125 VOYLES, *supra* note 1, at 84 (quoting Frank MacPherson, *Relations Between the Navajo Indian Tribe-Area Office of the Navajo Indian Reservation, and the U.S. Atomic Energy Commission*, NARMR 434-99-208, "Program Correspondence," Box 3 (Nov. 13, 1951)).

126 *Exxon*, 108 F. Supp. 3d at 523.

127 *Id.*

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June 11th, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman
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Dear Judge Walker,

My name is Tahmineh Dehbozorgi and I am honored to apply for a clerkship with your chambers for the 2024-2025 term. I am currently a rising third-year student at The George Washington University Law School and will graduate in 2024.

Growing up in Iran under the despotic rule of the Islamic Republic government has fueled my passion for defending the rule of law. As an aspiring civil rights attorney, I am committed to protecting private property rights, promoting freedom of speech, and upholding the rule of law. I believe that joining your chambers under your mentorship would help provide me with the tools to become a public servant and a defender of our Constitution.

My coursework, internships, and extracurricular activities have prepared me for this opportunity. I have taken courses in Constitutional Law, Administrative Law, and Remedies, which have given me a solid foundation in the principles and theories that underlie the issues on your docket. I have developed strong research and writing skills that I feel would be invaluable to this position. Participating in various moot court competitions, including the Van Vleck Constitutional Law Moot Court Competition, has also helped me develop my advocacy skills, further honing my ability to analyze complex legal issues and present them clearly and accurately.

I also had the privilege of clerking for the New Civil Liberties Alliance, where I assisted in litigation on complex cases at both the trial and appellate levels, defending the rights of American citizens. I produced targeted research and written analyses under strict deadlines, through which I gained substantial legal research experience. In addition to my legal skills, I have honed my ability to communicate effectively with various stakeholders and advance effective policy solutions. While working at the Federal Communications Commission, I assisted with regulatory proceedings and conducted research on various administrative law issues.

A resume, law school transcript, undergraduate transcript, and a writing sample are enclosed. Letters of recommendation from Dean Aram Gavoor, Professor Daniel Solove, and Mr. Clegg Ivey will follow. Please do not hesitate to contact me at the above address or telephone number if you need additional information. Thank you for your time and consideration.

Sincerely,

Tahmineh Dehbozorgi

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## EDUCATION

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Honors: James A. Gass Merit Scholarship | Federal Communications Bar Association Scholarship
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**University of California, Los Angeles (UCLA)** Los Angeles, CA
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**Farsi** (Native) | **French** (Proficient) | **Arabic** (Proficient) | **Spanish** (Intermediate) | **German** (Intermediate)

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**AT&T**, Washington, D.C. | ***Global Public Policy Intern*** May 2023 – Present
- Analyze and draft memos on FTC's Magnuson-Moss rulemaking concerning privacy and competition
- Collaborate with Assistant Vice President of GPP on drafting comments for FTC's Negative Options Rule amendment

**Federal Communications Commission**, Washington, D.C. | ***Legal Intern*** Aug. 2022 – Dec. 2022
- Advised Chief of Public Safety and Homeland Security Bureau with legal issues regarding cybersecurity and licensing
- Researched FCC's rulemaking authority pursuant to "Cyber Incident Reporting for Critical Infrastructure Act of 2022"
- Synthesized complex technical documents on telecommunication infrastructure for attorneys

**New Civil Liberties Alliance**, Washington, D.C. | ***Summer Law Clerk*** May 2022 – July 2022
- Researched and compiled legal memoranda for impact litigation in constitutional appellate cases
- Drafted portions of *amicus* brief analyzing reasonable expectations of privacy related to Fourth Amendment
- Provided legal analysis on standing and mootness to survive a motion to dismiss in the First Circuit

**The George Washington University Law School**, Washington, D.C. | ***Research Assistant*** March 2022 - Present
- Conduct legal and historical research with Professor Robert J. Cottrol by using primary sources in foreign languages
- Edit and correct citations of a book on the history of African immigrants in Cape Verde, Argentina

**Young Voices**, Washington, D.C. | ***Digital Director & Public Relations Associate*** Jan. 2021 – Aug. 2021
- Placed 45 clients on TV and radio segments such as Fox News, Sky News, and Fox 5 D.C.
- Developed and managed Young Voices' branding, content strategy, and public relations efforts
- Appeared regularly on radio, podcasts, and TV to discuss topics related to education, foreign policy, and elections

**University of California**, Los Angeles, CA | ***Research Assistant*** Jan. 2020 – June 2020
- Analyzed statistical data for shareholders of private and public entities in Iran to measure data disclosure transparency
- Measured the impact of U.S. sanctions on Iran's spending priorities from 2009-2019

**Office of Congressman Thomas Massie (KY-4)** Washington, D.C. | ***Legislative Intern*** March 2019 – June 2019
- Assisted and advised constituents with navigating their cases involving federal agencies such as the USCIS and the IRS
- Conducted legislative research on topics including firearm regulations and healthcare policy

## INTERESTS

Music (choral singing and playing the violin) | Watercolor Painting | Video Gaming | Martial Arts and Fitness | Poetry

# TAHMINEH DEHBOZORGI

115 Anthem Ave, Herndon, VA 20170 | (310) 910-2998 | tahmineh@law.gwu.edu


## PUBLICATIONS

1. *The GOP Must Reject Populism or Continue Losing Young Voters*, ORANGE COUNTY REGISTER, May 26, 2023.
2. *Students Need the Internet to Succeed, Congress Can Do Something About it*, WASHINGTON EXAMINER, May 23, 2023.
3. *The FTC Is Making a Mistake by Trying to Stop Microsoft from Acquiring Activision*, NATIONAL REVIEW, April 11, 2023.
4. *Congress Must Authorize FCC to Auction More Spectrum to 5G Provides*, DC JOURNAL, March 21, 2023.
5. *Iranian Americans Continue to Put Pressure on Rogue Regime in Iran*, ORANGE COUNTY REGISTER, March 11, 2023.
6. *Consumers Must Not Bear the Cost of Southwest Airlines' Chaos*, ORANGE COUNTY REGISTER, Jan. 3, 2023.
7. *The U.S. and its Allies Must Stand with the Iranian People Against Tyranny*, ORANGE COUNTY REGISTER, Sept, 22, 2022.
8. *Law Schools Shouldn't Be Ideological Echo Chambers*, ORANGE COUNTY REGISTER, Aug. 15, 2022.
9. *President Biden Must Prioritize Checking China's Global Ambitions*, ORANGE COUNTY REGISTER, July 22, 2022.
10. *SCOTUS Must Limit Unwarranted Searches*, NEW CIVIL LIBERTIES ALLIANCE, July 21, 2022.
11. *Don't Let the Cancel Culture Restrict the Arts*, ORANGE COUNTY REGISTER, May 30, 2022.
12. *The West Must Prevent the War in Ukraine from Prolonging*, L.A. DAILY NEWS, March 16, 2022.
13. *Students Deserve In-Person Instruction, Not Substandard Remote Learning*, ORANGE COUNTY REGISTER, Jan. 16, 2022.
14. *Cybersecurity Must Be Top Priority*, ORANGE COUNTY REGISTER, Sept. 19, 2021.
15. *The Botched Withdrawal from Afghanistan Will Cost Humanity Greatly*, ORANGE COUNTY REGISTER, Sept. 12, 2021.
16. *Political Correctness Infects Our Speech and Our Ideas*, ORANGE COUNTY REGISTER, July 7, 2021.
17. *Juneteenth Is the Celebration of Individualism*, FREE THE PEOPLE, June 23, 2021.
18. *Consumers Will Pay for Cyberattacks on Beef Megaproducer*, ORANGE COUNTY REGISTER, June 17, 2021.
19. *Eulogy for Mathematics in California*, ORANGE COUNTY REGISTER, May 24, 2021.
20. *America Must Remain Vigilant About China's Global Ambitions*, ORANGE COUNTY REGISTER, March 28, 2021.
21. *The Future of Conservatism Isn't Trumpism, it's Liberty*, ORANGE COUNTY REGISTER, Jan. 17, 2021.
22. *The Private Sector is Stepping Up to Close the Digital Divide*, ORANGE COUNTY REGISTER, Jan. 2, 2021.
23. *Young People Need Freedom to Achieve the American Dream*, ORANGE COUNTY REGISTER, Nov, 23, 2020.
24. *The End of the Petro-State*, REALCLEAR WORLD, Oct. 26, 2020.
25. *Want to Save the Gig Economy? Let's Hope Prop. 22 Passes*, TOWNHALL, Sept. 2, 2020.
26. *Congress Needs to Act to Prevent a Massive Meat Shortage*, FREE THE PEOPLE. July 24, 2020.
27. *Harvard Law Professor Proposes "Common Good Constitutionalism",* CAMPUS REFORM, May 5, 2020.
28. *Wisconsin Campus Free Speech Debate a Hot Topic, Even With Students at Home*, CAMPUS REFORM, April 7, 2020.
29. *5 Times Students' First Amendment Rights Were Violated on Campus in 2019*, CAMPUS REFORM, Jan. 11, 2020.
30. *California Freelance Law Muzzles Student Journalists Like Me*, CAMPUS REFORM, Jan. 6, 2020.
31. *UCLA's 'Storytelling for Social Justice' Pushes "Unsubstantiated" Claims*, CAMPUS REFORM, Dec. 4, 2019.
32. *How US Foreign Policy Hurts Iranian Americans*, WASHINGTON EXAMINER, Nov. 18, 2019.

## SELECTED MEDIA APPEARANCES

- *Global Lane*: *Iranian Protestors are Tortured by the Government* (CBN March 23, 2023).
- *America's Newsroom*: *Law Student Responds to Justice Thomas' Teaching Resignation* (Fox News July 28, 2022).
- *KTVO News*: *Law Student Speaks Up for Clarence Thomas* (ABC News July 8, 2022).
- *Fox & Friends*: *GW Supports Clarence Thomas Teaching at Law School* (Fox News June 30, 2022).
- *The Lead*: *Reasons Why U.S. Will Not Go Back to the Nuclear Deal with Iran* (Iran International Feb. 18, 2021).
- *The Final 5*: *GameStop Stock Saga Evokes Nostalgia for Gamers* (Fox 5 DC Jan. 15, 2021).
- *The Final 5*: *How the PRIME Act Could Fix Meat Shortages During COVID-19* (Fox 5 DC Aug. 7, 2021).

# THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G36249493
Date of Birth: 17-AUG

Date Issued: 06-JUN-2023

Record of: Tahmineh Dehbozorgi

Page: 1

Student Level:
Admit Term:

Issued To: TAHMINEH DEHBOZORGI
TAHMINEH@LAW.GWU.EDU

REFNUM:5633830

Current College(s):
Current Major(s):

SUBJ NO COURSE TITLE CRDT GRD PTS

GEORGE WASHINGTON UNIVERSITY CREDIT:

Fall 2021
Law School
Law
MUS 1091 University Singers 0.00 P
Ehrs 0.00 GPA-Hrs 0.00 GPA 0.000
CUM 0.00 GPA-Hrs 0.00 GPA 0.000
Good Standing

Spring 2022
Law School
Law
MUS 1061 Chamber Ensembles 0.00 P
-I,II,III,IV
Ehrs 0.00 GPA-Hrs 0.00 GPA 0.000
CUM 0.00 GPA-Hrs 0.00 GPA 0.000
Good Standing

Fall 2022

CMUS 1091 University Singers 0.00 P
Ehrs 0.00 GPA-Hrs 0.00 GPA 0.000
CUM 0.00 GPA-Hrs 0.00 GPA 0.000
Good Standing

Spring 2023

CMUS 1091 University Singers 0.00 P
Ehrs 0.00 GPA-Hrs 0.00 GPA 0.000
CUM 0.00 GPA-Hrs 0.00 GPA 0.000
Good Standing

********** TRANSCRIPT TOTALS **********

| | Earned Hrs | GPA Hrs | Points | GPA |
|---|---|---|---|---|
| TOTAL INSTITUTION | 0.00 | 0.00 | 0.00 | 0.000 |
| OVERALL | 0.00 | 0.00 | 0.00 | 0.000 |

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Katie Cloud
Interim University Registrar

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WASHINGTON, DC

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Student Level: Law
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TAHMINEH@LAW.GWU.EDU

REFNUM:5633830

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

| SUBJ NO | COURSE TITLE | CRDT | GRD PTS |
|---|---|---|---|
| **Fall 2021** | | | |
| Law School | | | |
| Law | | | |
| LAW 6202 | Contracts<br>Chatman | 4.00 | B+ |
| LAW 6206 | Torts<br>Schoenbaum | 4.00 | B- |
| LAW 6212 | Civil Procedure<br>Smith | 4.00 | B- |
| LAW 6216 | Fundamentals Of Lawyering I<br>Pont | 3.00 | B+ |
| Ehrs 15.00 GPA-Hrs 15.00 GPA 2.978 | | | |
| CUM 15.00 GPA-Hrs 15.00 GPA 2.978 | | | |
| Good Standing | | | |
| **Spring 2022** | | | |
| Law School | | | |
| Law | | | |
| LAW 6208 | Property<br>Nunziato | 4.00 | B |
| LAW 6209 | Legislation And Regulation<br>Schaffner | 3.00 | B+ |
| LAW 6210 | Criminal Law<br>Cottrol | 3.00 | B |
| LAW 6214 | Constitutional Law I<br>Morrison | 3.00 | B- |
| LAW 6217 | Fundamentals Of Lawyering II<br>Pont | 3.00 | B |
| Ehrs 16.00 GPA-Hrs 16.00 GPA 3.000 | | | |
| CUM 31.00 GPA-Hrs 31.00 GPA 2.989 | | | |
| Good Standing | | | |

********** CONTINUED ON NEXT COLUMN **********

| SUBJ NO | COURSE TITLE | CRDT | GRD PTS |
|---|---|---|---|
| **Fall 2022** | | | |
| LAW 6400 | Administrative Law<br>Gavoor | 3.00 | A |
| LAW 6486 | Information Privacy Law<br>On<br>Solove | 3.00 | A |
| LAW 6644 | Moot Court - Van Vleck | 1.00 | CR |
| LAW 6668 | Field Placement<br>Mccoy | 2.00 | CR |
| LAW 6673 | Field Placement Tutorial<br>Mccoy | 1.00 | A |
| LAW 6883 | Counterintelligence Law&Policy<br>Kedian | 2.00 | B |
| Ehrs 12.00 GPA-Hrs 9.00 GPA 3.778 | | | |
| CUM 43.00 GPA-Hrs 40.00 GPA 3.167 | | | |
| Good Standing | | | |
| **Spring 2023** | | | |
| LAW 6238 | Remedies | 3.00 | B+ |
| LAW 6380 | Constitutional Law II | 3.00 | A- |
| LAW 6402 | Antitrust Law | 3.00 | A |
| LAW 6474 | Trademark & Unfair Compet Law | 3.00 | B+ |
| LAW 6870 | National Security Law | 2.00 | A |
| Ehrs 14.00 GPA-Hrs 14.00 GPA 3.643 | | | |
| CUM 57.00 GPA-Hrs 54.00 GPA 3.290 | | | |
| Good Standing | | | |
| **Fall 2023** | | | |
| LAW 6232 | Federal Courts | 3.00 | ---------- |
| LAW 6255 | Ucc Sales Of Goods | 2.00 | ---------- |
| LAW 6414 | Telecommunications Law | 2.00 | ---------- |
| LAW 6601 | History Of The Common Law | 3.00 | ---------- |
| LAW 6652 | Legal Drafting | 2.00 | ---------- |
| LAW 6656 | Independent Legal Writing | 2.00 | ---------- |
| Credits In Progress: 14.00 | | | |

********** TRANSCRIPT TOTALS **********

| | Earned Hrs | GPA Hrs | Points | GPA |
|---|---|---|---|---|
| TOTAL INSTITUTION | 57.00 | 54.00 | 177.67 | 3.290 |
| OVERALL | 57.00 | 54.00 | 177.67 | 3.290 |

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Katie Cloud
Interim University Registrar

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THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

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**DESIGNATION OF CREDIT**
All courses are taught in semester hours.

**TRANSFER CREDIT**
Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

**EXPLANATION OF COURSE NUMBERING SYSTEM**
**All colleges and schools beginning Fall 2010 semester:**

| | |
|---|---|
| 1000 to 1999 | Primarily introductory undergraduate courses. |
| 2000 to 4999 | Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work. |
| 5000 to 5999 | Special courses or part of special programs available to all students as part of ongoing curriculum innovation. |
| 6000 to 6999 | For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office. |
| 8000 to 8999 | For master's, doctoral, and professional-level students. |

**All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:**

| | |
|---|---|
| 001 to 100 | Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit. |
| 101 to 200 | Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work. |
| 201 to 300 | Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean. |
| 301 to 400 | Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students.<br>Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students.<br>School of Business – Limited to doctoral students. |
| 700s | The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors. |
| 801 | This number designates Dean's Seminar courses. |

**The Law School**
***Before June 1, 1968:***

| | |
|---|---|
| 100 to 200 | Required courses for first-year students. |
| 201 to 300 | Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval. |
| 301 to 400 | Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval. |

***After June 1, 1968 through Summer 2010 semester:***

| | |
|---|---|
| 201 to 299 | Required courses for J.D. candidates. |
| 300 to 499 | Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission. |
| 500 to 850 | Designed for advanced law degree students. Open to J.D. candidates only with special permission. |

**School of Medicine and Health Sciences and**
**School of Public Health and Health Services before Fall 2010 semester:**

| | |
|---|---|
| 001 to 200 | Designed for students in undergraduate programs. |
| 201 to 800 | Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences. |

**CORCORAN COLLEGE OF ART + DESIGN**
The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

**THE CONSORTIUM OF UNIVERSITIES OF**
**THE WASHINGTON METROPOLITAN AREA**
Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

| | | | |
|---|---|---|---|
| AU | American University | MMU | Marymount University |
| CORC | Corcoran College of Art & Design | MV | Mount Vernon College |
| | | NVCC | Northern Virginia Community College |
| CU | Catholic University of America | PGCC | Prince George's Community College |
| GC | Gallaudet University | SEU | Southeastern University |
| GU | Georgetown University | TC | Trinity Washington University |
| GL | Georgetown Law Center | USU | Uniformed Services University of the Health Sciences |
| GMU | George Mason University | | |
| HU | Howard University | UDC | University of the District of Columbia |
| MC | Montgomery College | UMD | University of Maryland |

**GRADING SYSTEMS**
**Undergraduate Grading System**
*A,* Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
*Effective Fall 2011:* The grading symbol RP indicates the class was repeated under Academic Forgiveness.
*Effective Fall 2003:* The grading symbol R indicates need to repeat course.
*Prior to Summer 1992:* When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
*Effective Fall 1987:* The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
*Effective Summer 1980:* The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

**Graduate Grading System**
(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
*Effective Fall 1994:* The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

**Law Grading System**
*A+, A, A-,* Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

**M.D. Program Grading System**
*H,* Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit
http://www.gwu.edu/transcriptkey

New Civil Liberties Alliance

To Whom It May Concern,

I highly recommend Tahmineh Dehbozorgi for a judicial clerkship. Tahmineh worked at the New Civil Liberties Alliance as a legal clerk during the summer of 2022, primarily doing legal research and writing, but her work also included participation in moots for upcoming court arguments, evaluating potential new cases, attending events on administrative law, and brainstorming about legal developments and how they might bear on the firm's work in constitutional and administrative law.

Tahmineh's legal work was of the highest quality. Indeed, NCLA invited Tahmineh back for the summer of 2023 as a senior law clerk - the only one of her peers to be so invited. NCLA also sponsored Tahmineh for the Bradley Summer Associate Fellowship in 2023, which she was granted.

Tahmineh is an extraordinary woman, filled with passion and the kind of moxie that sets her apart from her peers. Like many intelligent law students, she excels at disentangling knotty issues and drafting cogent, crisp analyses, but I also found that her extensive experience in public relations and media gave her a real talent for finding the "hook" in an argument. Despite the volume of work she produced, Tahmineh remained happily engaged, producing work that could be relied upon for its comprehensiveness, accuracy, and insight.

Tahmineh's work covered a variety of thorny issues, including helping to draft briefing on the special needs exception to the Fourth Amendment. She also drafted a motion to dismiss in a 1983 claim against agencies and officials in Rhode Island, and a FOIA memo for one of our vaccine mandate cases. She was especially helpful in doing research and mooting to help our appellate litigators prepare for oral argument in an SEC-related appeal in the Fifth Circuit.

Tahmineh has a strong work ethic, but she is a happy warrior - you want her next to you in that foxhole. Every time NCLA had an event open to the public, it seemed like Tahmineh brought several new faces in. She is a natural born leader and her peers find her persuasive: They want to follow her.

I remember with fondness my year spent clerking in the Sixth Circuit back in the late 90s, so I am speaking from personal experience when I say that I am confident that the professional work and morale of any chambers would be greatly enhanced by Tahmineh's presence. I recommend Tahmineh without any reservation.

Please do not hesitate to contact me should you require additional information.

Sincerely,

Clegg Ivey

J Clegg Ivey III

The George Washington University Law School
2000 H Street NW
Washington, DC 20052

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I enthusiastically recommend Tahmineh Dehbozorgi for a clerkship in your chambers. Her intellect, passion for the law, work ethic, and poise make her an excellent candidate. She is the personification of the American dream as a naturalized U.S. citizen who fled the Islamic Republic of Iran along with her family. If given the opportunity to clerk in your chambers, I am confident that she will succeed in her work with minimal need for supervision.

Tahmineh took my Administrative Law course in the fall 2022 semester at the George Washington University Law School. She earned an A by performing superbly on my examination and by answering my Socratic method questions with nuance and poise. She is taking my Constitutional Law II (individual liberties) and National Security Law courses in the spring 2023 semester. Unsurprisingly, Tahmineh has asked incisive questions and answered my questions exceptionally well. She makes the most out of every moment that she has in law school. Her work ethic is inspiring, as is her deep commitment to American liberal democratic principles. To that end, she boasts an impressive comprehension of constitutional and statutory interpretive methodology. She has a strong command of Originalism and Textualism that is undergirded by her knowledge of non-originalist and purposivist methodologies.

Outside the classroom, Tahmineh has fully asserted herself. She is active in the Student Bar Association, the Federalist Society, and National Security Law Association. She has served as a legal intern at the Federal Communications Commission and the New Civil Liberties Alliance. She also authors op-eds and regularly appears on national and international news on account of her parallel career as columnist. As a clerk in your chambers, she would apply her knowledge and skills exclusively to court matters.

Tahmineh also has the temperament to capably serve as a clerk. She is humble, yet assertive. She is deeply thoughtful. Most importantly, she is mature and exercises sound judgment. If you have any questions about or would like to discuss my unreserved recommendation of Tahmineh, please do not hesitate to contact me at (202) 994-2505 or at agavoor@law.gwu.edu.

Sincerely,

Aram A. Gavoor
Associate Dean for Academic Affairs
& Professorial Lecturer in Law

The George Washington University Law School
2000 H Street NW
Washington, DC 20052

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I strongly recommend Tahmineh Dehbozorgi to be a law clerk in your chambers. Tahmineh is a terrific student and excellent writer. She is thoughtful and hard-working, and I am confident that she will be a great clerk.

Tahmineh was in my Information Privacy Law class. She was a very engaged student and participated frequently. Her comments were always thoughtful and on point. Her performance on the final exam was excellent – she earned an A.

Tahmineh also wrote a short paper under my supervision, a requirement of her field placement at the Federal Communications Commission. Her paper was well-written – clear, concise, insightful, and sophisticated. Because I was so impressed with her work, I recommended her to AT&T for a summer internship position this summer, and she ultimately got the job.

Tahmineh really hit her stride last fall semester here at George Washington University Law School. She had a superb semester. She is a hard and diligent worker, and she has always been courteous and professional. She is tremendously enthusiastic about her work, and this translates into her going the extra mile.

Therefore, I very strongly recommend Tahmineh for a clerkship in your chambers. Her writing and analytical abilities are terrific. I am confident that she will go above and beyond as a law clerk.

Please feel free to contact me at (202) 441-8412 or dsolove@law.gwu.edu if you have further questions.

Sincerely,

Daniel J. Solove

**WRITING SAMPLE**

Tahmineh Dehbozorgi
115 Anthem Ave.
Herndon, VA 20170
(3100-910-2998

The attached writing sample is an excerpt from a brief submitted for The George Washington University's Van Vleck Constitutional Law Moot Court Competition. The case involved a challenge to the New Columbia Challenge Statute allowing "[a]ny qualified voter registered to vote for the office for which [a] candidate has filed" may challenge said candidate's eligibility by filing a complaint with the Superintendent of Elections ("Superintendent"), "alleg[ing] with specificity the grounds for asserting that [he] does not meet the constitutional or statutory qualifications for office." A voter in Petitioner Rep. Oshaghnessy's congressional district filed such a challenge, contesting Petitioner's eligibility to serve in the United States House of Representatives alleging that the Petitioner has engaged in insurrection by giving Capitol rioters a tour of the Capitol complex. Before the Superintendent could hold a hearing and issue a decision, Petitioner filed suit, asking that the district court enjoin the assertedly unconstitutional adjudication from moving forward. The competition problem differed somewhat from the actual case then pending before the United States Supreme. Court The questions presented for the competition were:

1. Whether the federal courts have jurisdiction under Article III of the U.S. Constitution and pursuant to the Younger Abstention Doctrine to adjudicate the constitutionality of the New Columbia Challenge Statute at this stage in the state proceedings?

2. Whether the New Columbia Challenge Statute violates Article I, Section 5 of the U.S. Constitution by empowering the State of New Columbia to determine whether a candidate is eligible to hold the office of a United States Representative?

I represented the Respondent, Superintendent Morgenthal. I chose the section of brief addressing Article I, Section 5 as my writing sample.

## II. THE NEW COLUMBIA CHALLENGE STATUTE DOES NOT VIOLATE ARTICLE I, SECTION 5 OF THE U.S. CONSTITUTION.

### A. The text of Article I, Section 5, Clause 1 is silent on setting qualifications for Congressional "candidates".

Petitioner's claim that New Columbia may not constitutionally determine the qualifications of its Congressional *candidates* is textually flawed. The text of Article I, Section 1, Clause 1 plainly reads: "Each House shall be the Judge of the Elections, Returns and Qualifications of *its own Members*"; it does not mention "candidates." U.S. Const. art. I, § 5, cl. 1 (emphasis added). The Challenge Statute applies only to *candidates*, not "Members," as this Court has defined that term. *See Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 615 (1929) (defining "Member" as a candidate elected to either House and who receives a certificate from Governor to that effect).

In *Cawthorn*, Judge Wynn ably analyzes the text of the provision upon which Petitioner rests his attack. *Cawthorn v. Amalfi*, 35 F.4th 245, 262 (4th Cir. 2022) (Wynn, J., concurring). "By its clear terms," Judge Wynn observed, Article I, Section 5, Clause 1 "only applies to Congress's 'own Members' — those individuals *elected or appointed* to our national legislative body." *Id.* (emphasis added). Indeed, as ours is a government of enumerated powers, "if the Framers expressly conferred 'some powers' on Congress, but not others, we must conclude those other powers have not been granted." *Id.* (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. at 534, (2012)); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 847 (1995) (Thomas, J. dissenting) ("The Federal Government enjoys no authority beyond what the Co nstitution confers: The Federal Government's powers are limited and enumerated."). The Challenge Statute empowers voters to challenge the qualifications of *candidates* in state, federal, and local elections, *not* those of sitting members of Congress. (N.C. Gen. Stat. § 107-18; R. at 1). New Columbia must be presumed to

possess this power. As the Constitution is silent on setting qualifications for candidates, to construe its text to grant such a power is to ignore the Tenth Amendment and undermine the very character of our national government. *See* U.S. Const., amend X.

Judge Tsai's dissent, echoing Petitioner's position, confuses "candidate" with "Member," using them interchangeably despite their varying nature. (*Oshaghnessy v. Morgenthal*, No. 22-1623556 (13th Cir. July 26, 2022) (Tsai, J., dissenting); R. at 10). Simply put, this is not what the Framers intended by their careful use of the word "Members." U.S. Const. art. I, § 5, cl. 1. To confound these terms is to presuppose that "the Constitution was unartfully drafted, and that the Framers must have mistakenly omitted 'candidates' or 'would-be Members' from Article I, Section 5." *Cawthorn*, 35 F.4th at 264 (Wynn, J., concurring). Judge Wynn could not adopt such an erroneous interpretation, and nor should this Court.

Further, Congress has never exercised the power of judging the constitutional qualifications of candidates. Such long historical practice weighs heavily against Petitioner's misconstruction. *Barry*, for instance, illustrates the meaning of "Member" under Article 5, Section 1, and qualifies Congress' adjudicatory power over its members. *Barry*, 279 U.S. 597. A candidate, William Vare, was elected to the U.S. Senate and received a certificate from the governor affirming his placement; the Senate, however, refused to seat him. *Id*. The Court explained that the Senate had the authority to adjudicate Vare's constitutional qualifications because he was elected and certified as the winner of the race and was, as such, a *member* of the United States Senate. *Id.* at 613 (citing *Reed v. County Commissioners*, 277 U. S. 376, 388 (1928)). Therefore, the Senate had properly asserted jurisdiction under Article 1, Section 5 of the U.S. Constitution. As an additional example, take *Powell v. McCormack*, where the House refused to seat a Representative on the

basis of allegations of fraud and illegal monetary transactions. *Powell v. McCormack*, 395 U.S. 486 at 489 (1969). Powell argued that such a refusal was unconstitutional because he was properly elected and met all constitutional requirements for service as a *member* of the U.S. House of Representatives. *Id.* at 490. The defendants invoked Article 1, Section 5, Clause 1 to authorize their refusal. *Id.* at 522. Nonetheless, this Court found that the House had overstepped, holding that it only has discretion to determine whether a member meets the qualifications expressly stated in Article I, Section 2 --– requirements of age, citizenship, and residence. *See* U.S. Const., art. I, § 2. The Court stressed the importance of allowing the people of the States to choose their legislators, "conclud[ing] that Article I, Section 5 is *at most* a 'textually demonstrable commitment' to Congress to judge *only* the qualifications *expressly set forth in the Constitution*." *Powell*, 395 U.S. at 548 (emphasis added).[1] Such a power over candidates, however, is glaringly absent from the text of Article I.

This Court must reject Petitioner's constitutional attack because the plain import of the Constitution, enriched by judicial precedent and historical practice, is clear: Congress, while empowered to adjudicate certain limited disputes as to whether a member qualifies to be seated, does not have the authority to judge the qualifications of candidates, even with respect to Congressional races.

### B. The Text of the Constitution and this Court has not precluded the states from judging the constitutional qualifications of congressional candidates under Article 1, Section 5.

[1] The Court reasoned that the "textual commitment" prong of the political questions doctrine did not bar federal courts from adjudicating claims concerning the exclusion of a member-elect from his duly won seat in Congress. *Powell*, 395 U.S. at 486.

Article 1, Section 5 does not preclude the States from adjudicating disputes over the qualifications of their congressional candidates. Under Article I, Section 1, Clause 1, "Each House shall be the *Judge* of the Elections, Returns and Qualifications of its own Members." U.S. Const. art. I, § 5, cl. 1 (emphasis added). New Columbia has the power to judge the qualifications of its own candidates without violating the Constitution. This Court has previously held that *adding* qualifications violates the Constitution. *See generally Thornton*, 514 U.S. at 779 (1995). Moreover, this Court has never interpreted Congress' authority in setting qualifications broadly but rather has limited such adjudicative power to its own members. U.S. *See Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 615 (1929). Const. art. I, § 5, cl. 1; *see McCulloch v. Maryland*, 17 U.S. 316, 405 (1819) (holding that Congress "can exercise only the powers granted to it"). The adjudicatory power over candidates clearly remains in the hands of the States.

**1. New Columbia Challenge Statute is adjudicative in nature and does not add additional qualifications to candidate eligibility.**

The state of New Columbia has the power to judge the qualifications of its own candidates without violating the Constitution. This Court must not analogize the facts of the current case to *Thornton* because the law in question is distinguishable. 514 U.S. 779 (1995). The Challenge Statute does not add any additional qualifications nor usurp the constitutionally empowered Congress to judge the qualifications of its members. It is an adjudicative law, allowing New Columbia to enforce pre-existing constitutional qualifications as applied to candidates, a class to which Petitioner belongs. (N.C Gen. Stat. § 107-18; (R. at 1)).

The dissent inartfully relies on *Thornton* in misclassifying state compliance with *pre-existing constitutional qualifications* as an attempt to *set* qualifications for members of Congress.

*Thornton*, 514 U.S. 779 (1995); (*Oshaghnessy v. Morgenthal*, No. 22-1623556 (13th Cir. July 26, 2022) (Tsai, J., dissenting); R. at 10). However, the Challenge Statute merely regulates candidates by *adjudicating* disputes over qualifications; it does not *add* an additional qualification beyond what the Constitution has provided in Article 1, Section 5, Clause 1. *See Thorton,* 514 U.S at 801. In *Thorton*, this Court was concerned about an inflexible statute that excluded a class of candidates on an extra-constitutional basis beyond the scope of state power under the Elections Clause. U.S. Const., Art. I, § 4, cl. 1.; *see id.* Thus, the Court struck down an amendment to the Arkansas State Constitution that "prohibit[ed] the name of an otherwise-eligible candidate for Congress from appearing on the general election ballot if that candidate ha[d] already served three terms in the House of Representatives or two terms in the Senate." *Thornton*, 514 U.S. at 783. The Court cited the legislative purpose behind the amendment, which was disqualifying congressional incumbents from further service. *Id.* at 829 (citing *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251 (1994)). It follows that Judge Tsai's reliance on *Thornton* is unfounded because the nature of the law there considered was significantly different from the Challenge Statute currently under consideration. (*Oshaghnessy v. Morgenthal*, No. 22-1623556 (13th Cir. July 26, 2022) (Tsai, J., dissenting); R. at 10).

Here, *Thornton* is not controlling; the current case is distinguishable because the New Columbia Challenge Statute does not add qualification requirements to the Constitution, and instead only sets forth a process to adjudicate pre-existing qualifications should disputes thereover arise. This Court in *Thornton* held that handicapping a class of candidates for Congress is unconstitutional when it has the purpose and effect of creating additional qualifications. *See Thornton*, 514 U.S. at 779.

The Challenge Statute is not merely a ballot-access statute, and its existence – unlike the amendment at issue in *Thornton* – does not automatically disqualify Petitioner from candidacy. It empowers the State only to adjudicate the qualifications of the candidates on a pre-existing constitutional basis. *See Thornton*, 514 U.S. at 779. Rather, the statute creates a framework through which the constitutional eligibility of a candidate can be challenged through an administrative adjudication, one which provides due notice and an opportunity to be heard. (N.C. Gen. Stat. § 107-18.; R. at 1). The Superintendent has the adjudicative power to determine the eligibility of the candidate after and upon the evidence gathered at a hearing. *See id.* Moreover, the Statute provides the candidate and the challengers an avenue to appeal their case to the New Columbia Supreme Court. *See id.*

The state of New Columbia may adjudicate such qualifications under the Challenge Statute without usurping the House's power under Article 1, Section 5. Therefore, it does not violate the rule laid down in *Thornton*, and as such, the Challenge Statute not only comports with the constitutional text but this Court's own precedents as well.

**2. A federal court has upheld a similar challenge statute against a similar constitutional attack, furnishing additional persuasive authority against Petitioner's claim.**

This Court should consider the current trend of law in upholding the constitutionality of the Challenge Statute. The State of Georgia has a similar challenge statute to New Columbia, which allows voters to challenge whether an individual candidate meets "the constitutional and statutory qualifications for holding the office being sought". Ga. Code Ann. § 21-2-5 (a) (West). The statute also provides an administrative procedure similar to the statute at hand to adjudicate the challenge. *Id.* at (b). Finally, the statute provides a right to seek prompt judicial review. *Id* at

(e). Representative Marjorie Taylor Greene filed a complaint contesting the constitutionality of Georgia's "Challenge Statute" after five voters in her district filed a challenge petition. *Greene v. Raffensperger*, 22-CV-1294-AT, 2022 WL 1136729, at *1 (N.D. Ga. Apr. 18, 2022). The court correctly held that "in complying with the procedures set out in the Challenge Statute, the State of Georgia [was] not imposing any additional qualifications on Plaintiff"; it was only enforcing the preexisting constitutional requirements set forth in the Fourteenth Amendment. *Id.* at *27; *see* U.S. Const. amend. XIV, § 3. As the New Columbia Challenge Statute similarly empowers the State to enforce preexisting constitutional requirements and does not impose additional qualifications on Petitioner, *Greene* provides a persuasive framework for this Court to follow in upholding the statute here under attack.

To maintain the constitutional balance between the state and the federal governments, it is crucial for the State of New Columbia to judge the qualifications of its own candidates and bar unqualified candidates. After all, the Constitution assigns such responsibilities to both Congress and the States. U.S. Const. art. I, § 4, cl. 1; *see Hutchinson v. Miller*, 797 F.2d 1279, 1284 (4th Cir. 1986) (acknowledging that the Constitution "express[ly] delegat[es] to Congress and the states [] shared responsibility for the legitimation of electoral outcomes"). Therefore, New Columbia has the authority to regulate its elections and preclude Petitioner from the ballot if he does not meet the constitutional minimum. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (holding that states have a strong interest in the stability of their political systems and the Constitution permits them to enact reasonable election regulations).

While Congress has a similar interest in ensuring that its members meet the constitutional requirements, the Framers explicitly set forth a procedure under Article I, Section 5 as a means of

advancing this interest. *See generally Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 615 (1929) (recognizing that Congress must exercise its constitutional power to exclude a member after he was officially elected). Similarly, States undoubtedly have a stake in ensuring that their interests and the interests of their citizens are represented by qualified congressional candidates.

Here, the State of New Columbia has a legitimate interest in adjudicating the challenge against Petitioner; after all, the states were the ratifying authorities that put into effect the Insurrection Clause. U.S. Const. amend. XIV, § 3. It would be senseless if they were powerless to enforce it. Furthermore, not allowing the voters of New Columbia to challenge the candidacy of Petitioner would frustrate foundational principles of comity and federalism. *See generally Younger v. Harris*, 401 U.S. 37, 44 (1971) (describing "Our Federalism" as a "system in which there is sensitivity to the legitimate interests of both State and National Governments").

Considering fundamental state interests and our dual system of government, this Court should uphold the constitutionality of the New Columbia Challenge Statute.

### C. Prohibiting the states from regulating the qualifications of their candidates under Art. I, Section 5 of the Constitution will upset the balance of power between the states and the federal government.

#### 1. To protect the states' interest in federal elections, This Court has interpreted the States' power to regulate elections broadly.

This Court has never recognized an exclusive power of Congress to regulate the qualifications of Congressional candidates. It has, however, recognized that the States have broad power to set requirements "as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved." *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

The State of New Columbia has a duty to preclude unqualified candidates from the ballot. *See Storer v. Brown*, 415 U.S. 724 (1974) (acknowledging "a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies"). This Court has implicitly recognized that preventing candidates who cannot hold the office they are seeking is a legitimate exercise of state power. *See Bullock v. Carter*, 405 U.S. 134 (1972) (holding that states have legitimate interests in regulating the number of candidates on the ballot to prevent clogging of the election machinery, avoid voter confusion, and assure that winner is choice of the majority). This authority no doubt extends to Petitioner, if indeed the serious allegations made against him have any merit.

Further, the Elections Clause states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. The Supreme Court has emphasized the sheer "breadth" of this grant of power, explaining that such "comprehensive words" provide a "complete code for congressional elections." *Roudebush v. Hartke* 405 U.S. 15, 24 (1972) (holding that recount of votes in the election for U.S. Senator is an integral part of Indiana electoral process); *see Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013) (acknowledging that Elections Clause imposes the duty to prescribe time, place, and manner of electing Representatives and Senators, but confers power to alter those regulations to Congress).

State governments are at least as capable as Congress to determine the age, citizenship, and residency status of congressional *candidates* — if not more so. Moreover, there is no precedent prohibiting the states from adjudicating the qualifications of candidates under Article 1, Section 5, Clause 1. In this case, Petitioner has pointed to no authority holding that New Columbia is barred

from evaluating whether a candidate meets the constitutional requirements of office or enforcing such requirements. *Oshaghnessy v. Morgenthal*, No. 22-sy-0428933 (D.D.N.C. June 15, 2022). The Challenge Statute is constitutional because New Columbia has the authority to protect its elections and exclude unqualified candidates under the Constitution from the ballot.

**2. Lower Courts have recognized state's interest in precluding unqualified candidates under Article I**

The States' authority to protect their elections from constitutionally unqualified candidates is a well-established principle among the lower courts. The 13th Circuit's reliance on *Lindsey* and *Hassan* is proper because these cases demonstrate the extent to which the States may enforce constitutional qualifications for candidates running within their jurisdiction. *Lindsay v. Bowen*, 750 F.3d 1061 (9th Cir. 2014); *Hassan v. Colorado*, 495 Fed. Appx. 947 (10th Cir. 2012). Although both cases concern presidential elections, they nonetheless articulate the importance of recognizing States' interests in protecting elections, doing so in conformity with the previous holdings of this Court.[2]

In *Lindsay*, the court emphasized that states have an interest, if not a duty, to protect the integrity of their political processes from frivolous or fraudulent candidacies. 750 F.3d 1061 (9th Cir. 2014). Peta Lindsay, 27, sought a place on the 2012 presidential primary ballot for the Peace and Freedom Party. *Id.* at 1063. She properly filed her nomination papers and was generally recognized as a candidate for that party. *Id*. The Secretary of State unilaterally excluded her from

[2] The *Greene* court found the holdings in the presidential cases persuasive and held that the Article 1, Section 5, Clause 1 applies to "its own members," not candidates, and recognized that deciding otherwise would leave a state defenseless to protect its ballot. *See* 2022 WL 1136729, at 26-28.

the ballot because "Lindsay wasn't constitutionally eligible to be president." *Id.* (emphasis deleted); U.S. Const. art. II, § 1, cl. 5.

In *Hassan*, the plaintiff, who was a naturalized citizen, charged that the State barring him from ballot access was unconstitutional. 495 Fed. Appx. at 1. Then-judge Gorsuch rejected that argument, holding that the State had a legitimate interest in excluding Hassan from the ballot and properly exercised its power to do so because he was constitutionally ineligible to assume the office he desired. *Id.*; U.S. Const. art. II, § 1, cl. 5.

In conclusion, our Constitution gives States a say in regulating the candidates who seek to represent their interests and the interests of their citizens. In recognition of this, the Court should uphold the constitutionality of the Challenge Statute.